90-297

No. _____

In The

Supreme Court of the United States

October Term, 1990

PORTER H. MITCHELL,

Petitioner,

vs.

MOBIL OIL CORPORATION, *et al.*,
a New York Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In reversing a judgment for petitioner based on a correctly instructed jury's finding of willful violation of ADEA on the ground that he failed to sustain his burden of production on the issue of pretext, did the Tenth Circuit:

(a) misapply *Wards Cove* and the *McDonnell-Burdine* three-step analysis in the context of a jury trial by ruling that the jury had to accept Mobil's business reasons at face value without judging their credibility or considering them in relation to plaintiff's case and holding that Mitchell had to produce additional evidence directly rebutting Mobil's proffered reasons beyond that contained in his case-in-chief? and

(b) deny Mitchell a fair assessment of the cumulative evidence by invading the exclusive province of the jury through *de novo* appellate fact finding and insulating key fact issues from jury consideration in derogation of Mitchell's right to trial by jury?

2. Did the Tenth Circuit ignore evidence and create a conflict among the circuits by construing *Firestone v. Bruch* to mean that an involuntarily terminated ERISA plan participant has no standing to sue under ERISA for violation of fiduciary duties or for benefits not earned because of the termination?

LIST OF PARTIES

Petitioner:

Porter H. Mitchell

Respondents:

Mobil Oil Corporation, a New York corporation

Retirement Plan of Mobil Oil Corporation

Trustees of the Retirement Plan of Mobil Oil Corporation

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SECONDARY AUTHORITY:

Porter H. Mitchell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1-24) is reported at 896 F.2d 463. The district court's findings on plaintiff's ERISA claims (App. 32-40) and judgments (App. 41-43) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1990, and a petition for rehearing *en banc* was denied on April 17, 1990. App. 44-45. By order dated July 5, 1990, Justice White extended the time within which to file this petition for certiorari to August 15, 1990.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § 623(a):

It shall be unlawful for an employer --

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would

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[1] Petitioner requested an extension in hope that the court of appeals would decide whether Mitchell was entitled to a new trial on remand. The court refused to rule on the question, leaving it for trial court resolution. App. 46.

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

B. Employee Retirement Income Security Act ["ERISA"], 29 U.S.C. § 1002:

For purposes of this subchapter:

* * *

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

C. Employee Retirement Income Security Act ["ERISA"], 29 U.S.C. § 1132:

(a) A civil action may be brought --

(1) by a participant or beneficiary --

* * *

(B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations

> or (ii) to enforce any provisions of this title or the terms of the plan.

D. **Employee Retirement Income Security Act ["ERISA"], 29 U.S.C. § 1140:**

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

A. Nature of the Case. Before 1977, Mobil provided retirement benefits in the form of an annuity. In 1977, Mobil amended its Retirement Plan to allow employees to elect to receive the present value of their retirement benefits in a lump sum payment discounted at the 5% annuity rate. For each year of retirement before age 60, that lump sum payment was further reduced by 5%. To qualify for the lump sum, an employee had to: (1) be over age 55; and (2) have an accumulated lump sum value in excess of $250,000 or a personal net worth of at least $250,000.

In early 1984, Mobil's Executive Committee discussed amendments to the Retirement Plan, and in July 1984, Mobil announced two changes to the lump sum option. First, it raised the rate at which the present value of the lump sum was calculated from 5% to 9.5%. This higher discount rate would diminish the amount of each lump sum payment Mobil's Plan would be required to make. Second, Mobil raised the eligibility threshold from $250,000 to $450,000 and linked it to the Consumer Price Index ("CPI") so that the threshold would increase with inflation. Mobil delayed the effective date of these amendments for six months and informed employees that they could *only* qualify for the lump sum under the

$250,000 threshold *if* they retired before the amendments became effective.

In July 1984 when the changes were announced, petitioner, a 56-year-old geologist in his peak earning years, had worked for Mobil 31 years. Mobil's announcement imposed on Mitchell and many others the Hobson's choice of retiring during the six-month "window" in order to receive the more valuable lump sum payment or remaining employed with only the possibility of later requalifying for the lump sum. Raising the threshold would forever disqualify Mitchell and many other employees from receiving the lump sum option at all.

More than 1,000 older Mobil employees, including Mitchell, were forced to retire during the window period to preserve the larger lump sum option. Mobil's actuaries correctly predicted, *before* the changes were made, that such an extraordinary exodus would occur once the changes were effected.

B. Trial Court Disposition. Petitioner filed suit in the District of Colorado in March 1986, claiming that Mobil willfully violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ("ADEA"), and violated the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"), by manipulating the terms of its retirement plan to cause his involuntary retirement. The district court had jurisdiction under 28 U.S.C. § 1331.

In December 1988, the ADEA claim was tried to a seven-person jury and the ERISA claim to the court. In a five day trial, petitioner called several witnesses in his case-in-chief, including four high-ranking Mobil officers as adverse witnesses. Respondent's only witness was Rex Adams, Vice President of Employee Relations, recalled from Mitchell's case. The jury unanimously found that Mobil had willfully violated the ADEA and awarded petitioner: $405,962.76 in back pay, $86,000 for the 20% premature retirement penalty, and $96,740.82 in front pay. App. 51-52. Because the jury found that Mobil's ADEA

violation was willful, the trial court awarded petitioner liquidated damages in the amount of the back-pay award, $405,962.76. The trial court concluded that Mobil also violated ERISA (App. 42), and awarded petitioner $588,703.58.[2] Judgment was entered on January 5, 1989. App. 41-43. Mobil filed no post-trial motions.

C. Court of Appeals Disposition. Mobil appealed both the ADEA and ERISA judgments. The court of appeals reversed, concluding that petitioner had not met his burden of production on the issue of pretext on the ADEA claim and that he lacked standing under ERISA.

As to the jury's finding of willful violation of the ADEA, the court below addressed four issues.

First, it concluded that petitioner proved a prima facie case of age discrimination and affirmed the trial court's denial of Mobil's motion for a directed verdict made at the end of petitioner's case-in-chief.[3] It found that Mobil's plan amendments forced Mitchell, and similarly situated employees, "to choose between two options both of which would leave [them] worse off than the status quo" (App. 7), and that "Mobil would have treated him and other older employees less favorably,

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[2] The ERISA relief awarded was the sum of the compensatory damages awarded under ADEA. Petitioner, of course, could collect this amount only once even though two judgments were entered in his favor. App. 39.

The court of appeals twice erroneously stated (App. 5 & 21) that the trial court awarded liquidated damages on the ERISA claims. ERISA provides no such relief and the trial court gave none. App. 39-40.

[3] Although not referring to them by name, it is plain that the court applied the allocation of burdens and order of presentation of proof set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and later decisions from this Court (referred to herein as the *McDonnell-Burdine* method or approach).

because of their age, had they remained on the job." App. 8. The court rejected as "disingenuous" Mobil's argument that it had given Mr. Mitchell an "extra benefit" unavailable to younger employees and also rejected its contention that the changes affected all employees equally. Because employees under age 55 had not qualified to obtain the lump sum benefit, only employees over age 55 would have to *requalify* for it under the new eligibility criteria. App. 8-9.

Second, the court rejected Mobil's assertions of error in the jury instructions, concluding that the instructions correctly stated the law governing the case and were properly tailored to the facts of the case. App. 11.

Third, it declined Mobil's invitation to apply this Court's decision in *Public Employees Retirement Sys. of Ohio v. Betts*, 490 U.S. ___, 109 S. Ct. 2854 (1989).[4] The court recognized that petitioner's claim that Mobil had knowingly used its benefit plan to discriminate against him in a nonfringe-benefit aspect of the employment relationship (i.e., retaining his employment) was "exactly the type from which the *Betts* court did not intend to insulate the employers." App. 14.

Fourth, the court addressed Mobil's claims that its motion for a directed verdict at the close of all the evidence should have been granted, and alternatively, that there was insufficient evidence to support the jury's verdict. Having already concluded that Mitchell had established a prima facie case of age discrimination by constructive discharge, the court turned to the questions as to whether Mobil had rebutted the presumption of

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[4] The court ultimately held that *Betts* could not be applied retroactively in any event. More importantly, *Betts* could not apply because petitioner's trial theory was that Mobil manipulated the terms of its Retirement Plan as a scheme to rid itself of senior employees without the need to incur the expense of the "financial carrots" needed to make a true early retirement program legal.

discrimination by producing evidence of business reasons for its conduct, and if so, whether Mitchell had offered proof that the employer's proffered justification was a pretext for discrimination.

The court found that Mobil had produced evidence of two business reasons. First, Mobil offered financial "drain" on the plan to justify the increase in the eligibility threshold with a link to the CPI. Because inflation had eroded the real value of the $250,000 threshold since 1977, more employees were eligible for the lump sum option, and because the lump sum option was more valuable than the annuity option, more employees were selecting it, "creating a serious drain on Mobil's pension fund." App. 17. The court concluded that raising the threshold would stop this drain. Second, with respect to the delayed effective date of the amendments (the "window"), the court found that Mobil had produced evidence that it elected not to implement the changes immediately out of "fairness" to its employees, giving them a "transition period" to accrue benefits while they considered their forced choice. App. at 17-18.

Even though the first of the business reasons had been recanted by Mobil's own witness and the second discredited on cross-examination, the appellate court accepted the reasons and implicitly required the jury to do the same. The court then turned to petitioner's evidence of pretext and restricted its discussion to only one of the reasons Mitchell argued as to why Mobil amended the plan to force the retirement of older employees -- to avoid employee redundancy problems arising from an impending $5.7 billion merger with Superior Oil Company. Focusing solely on the chronology of but three exhibits, the court concluded that no reasonable person could relate the amendments to the merger because the window period was "adopted" by Executive Committee just one week after Committee discussion of the Superior merger "at length" and over one month before Mobil and Superior publicly announced the merger agreement.

Finally, the Court concluded that petitioner had no "standing" to assert ERISA claims because he did not seek reinstatement and had no colorable claim to vested benefits because the lump sum received was the full amount to which he was entitled under the Plan as of his termination.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals decided federal questions in conflict with applicable decisions of this Court and departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In reversing the district court's denial of Mobil's motion for a directed verdict at the close of all the evidence and nullifying petitioner's jury verdict, the court below misconstrued the fundamental nature of the case (disparate impact v. disparate treatment) and misapplied the method of proof set forth in several cases by this Court commencing with *McDonnell*. Moreover, the court of appeals impermissibly reweighed the evidence to achieve the result it would have reached had it been the trier of fact. In doing so, it wrongfully invaded the province of a properly instructed jury on purely factual issues by picking and choosing from the record to support its desired result. The errors of the court of appeals reveal both misapprehension of this Court's prior decisions and hostility to the purposes of the ADEA which this Court should not countenance. In abrogating petitioner's ERISA judgment for lack of standing, the court eviscerated the beneficent purposes of the Act, again weighed evidence (by ignoring facts of record), and decided the standing issue in a manner in conflict with decisions of this Court and other circuits.

A number of the court of appeals' errors are apparent on the face of its opinion. Those errors alone justify reversing the decision and remanding for a proper review of the jury's verdict consistent with this Court's decisions. Other errors are apparent only from review of the

record. Although petitioner acknowledges that this Court does not often undertake such review, this Court has not shirked from such review where it appears that a court of appeals has grossly overstepped the bounds of its reviewing authority, particularly when, as here, such unauthorized review has deprived a party of important federal rights. Public confidence in our judicial system demands zealous guarding of the limitations on the power of reviewing courts to disturb the deliberative results of trial courts and correctly instructed juries. This Court should undertake review of the record to the extent necessary to restore to petitioner his jury verdict.

A. The Court of Appeals Analysis of Mobil's Business Justifications and Petitioner's Burden of Production With Respect Thereto Conflicts With This Court's Decision in *Wards Cove Packing Co. v. Atonio.*

At trial, the parties, the court, and the instructions characterized the ADEA claim as one of disparate impact. Disparate impact and disparate treatment cases differ significantly, particularly at the business justification phase of the case. While an "articulation" of a business reason suffices to rebut the presumption of discrimination created by a plaintiff's prima facie showing in a treatment case, *Board of Trustees v. Sweeney,* 439 U.S. 24, 25 (1978), something more, "a reasoned review of the employer's justification for his use of the challenged practice," is required in an impact case. *Wards Cove Packing Co. v. Atonio,* 490 U.S. ___, 109 S. Ct. 2115 (1989). Obvious from the text of the opinion below, the Tenth Circuit felt that mere articulation of business reasons satisfied Mobil's burden of production on this issue. The court engaged in no "reasoned review" of Mobil's justifications and merely accepted them at face value.

Second, unlike treatment cases, pretext under a *Wards Cove* analysis can be shown not only by the methods set forth in *Burdine* (directly by persuading the trier of fact

that a discriminatory reason more likely than not motivated the employer or indirectly by showing the proffered reason unworthy of credence), but also by showing that the challenged practice does not carry out the purpose alleged by the employer or that the reason offered could be carried out by less discriminatory means. *Wards Cove*, 109 S. Ct. at 2126. *See* Instruction No. 13, App. 49-50. The Tenth Circuit restricted its attention only to *Burdine's* "unworthy of credence" test. Mitchell's evidence, however, satisfied all the tests. The changes did not carry out the "improvident investor" reason -- the only reason relied on by Mobil in its directed verdict motion. Further, the reasons selected by the court of appeals, "plan drain" and "fairness," could have been achieved without discriminatory impact by eliminating the threshold altogether (as IRS regulations required four months after Mobil's changes become effective), by grandfathering the lower threshold as was done with the discount rate (which the trial court found could have been done, App. 38), or as Mobil witnesses testified, by merely raising the discount rate and leaving the threshold untouched. Contrary to *Wards Cove*, the court ignored this evidence altogether.

Further, because it is permissible to try a case on both impact and treatment theories, *Wards Cove*, *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364 (2d Cir. 1989), and *Green v. U.S.X. Corp.*, 896 F.2d 801 (3d Cir. 1990), and because petitioner also presented evidence of intentional discrimination, the Tenth Circuit should, at the very least, have afforded Mitchell the benefit of both analyses. It failed utterly, however, to analyze pretext under *Wards Cove* and Instruction No. 13.

B. The Decision of the Court of Appeals Conflicts With This Court's *McDonnell-Burdine-Aikens* Line of Decisions.

In its disparate treatment analysis, the court of appeals misapplied the decisions of this Court governing

allocation of burdens and presentation of proof in three separate ways apparent on the face of the opinion.

First, the court of appeals rigidly adhered to the *McDonnell-Burdine* three-step approach after the case was fully tried on the merits in direct conflict with this Court's decision in *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

Second, contrary to *Burdine*, the court failed to recognize that a plaintiff can prevail on a treatment claim by establishing a prima facie case and by discrediting on cross-examination the defendant's proffered business reasons, without producing any additional evidence of intentional discrimination.

Third, the court of appeals supplied Mobil with a business reason not even relied upon in its motions for directed verdict. Decisions of this Court clearly require that the defendant, not the reviewing court, articulate a legitimate, nondiscriminatory business reason.

1. The Court of Appeals Erred in Rigidly Adhering to the *McDonnell-Burdine* Three-Step Analysis After the Case Was Fully Tried On The Merits.

The *McDonnell-Burdine* approach[5] consists of three steps. First, the plaintiff presents a prima facie case of discrimination. Second, the burden of production shifts to the defendant to present evidence of legitimate, nondiscriminatory reasons for its challenged practice to rebut the presumption of discrimination created by plaintiff's

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[5] The three-step method of analysis was further explained in *Aikens*. Although this Court has not yet expressly addressed the question whether the *McDonnell-Burdine* analysis applies to ADEA cases, the courts of appeal have consistently so applied it, and petitioner does not take issue with a proper application tailored to the specific nature of ADEA cases. Significantly, however, since the *McDonnell-Burdine* method was formulated in the context of Title VII cases tried to the court, care must be taken when applying the method to ADEA cases tried to a jury.

prima facie case. Third, plaintiff is given the opportunity to show that defendant's reasons were not its true reasons -- *i.e.*, that illegal motive more likely than not animated the challenged practice or that the reasons given were pretextual. *Burdine*, 450 U.S. at 252-53. Plaintiff's burden of showing pretext in the third step:

> . . . *now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination*. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256 (emphasis added).

Lower courts have struggled with the proper application of the *McDonnell-Burdine* formula, and this Court has been required to revisit the issue on more than one occasion. Most recently in *Aikens*, this Court emphasized:

> The *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

Aikens, 460 U.S. at 715 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

Specifically, *Aikens* directed that *after a case has been fully tried on the merits*, the district court and court of appeals should proceed directly to "the ultimate question of discrimination *vel non*." 460 U.S. at 714. This Court vacated and remanded in *Aikens* because it recognized that, after a case has been tried on the merits, a court may evaluate the evidence incorrectly if it separately addresses each of the three steps of the *McDonnell-Burdine* formula seriatim instead of looking directly to the

ultimate question of discrimination in light of all the evidence. This is precisely what occured in this case.[6]

This Court's warnings about the misuse of the three-step analysis in the context of Title VII cases, which are tried to the court, apply with even greater force in the context of ADEA cases which are tried to juries. In a Title VII case, the district court's written findings and conclusions spell out which facts it accepted, which it rejected, and its precise reasoning. A jury verdict, on the other hand, ordinarily includes findings only as to the ultimate questions (discrimination, willfulness, damages). The appellate court thus cannot know precisely how the jury reached its findings. Rigid application of the *McDonnell-Burdine* three-step analysis to a jury verdict, therefore, requires the court of appeals to speculate and "find" facts that the jury was never asked to find.

Here, the jury could, on credibility grounds alone, disbelieve Mobil witnesses and conclude that non-discriminatory reasons never existed, thus allowing the *prima facie* case to support plaintiff's verdict without ever addressing evidence of pretext. *EEOC v. Sandia Corp.*, 639 F.2d 600, 622-23 (10th Cir. 1980) (if factfinder rejects defendant's reasons, the inference of discrimination in plaintiff's *prima facie* case is not rebutted and the issue of pretext does not even arise). *See also* n.7, *infra*. If the jury did not believe that the reasons existed (which was fully within its prerogative to do, particularly on the evidence presented), it did not need even to consider whether the reasons were pretextual. The court of appeals thus reversed on fact issues the jury never had to consider in

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[6] Whether a case is analyzed on an impact or treatment theory, the rationale of *Aikens* should apply with equal force. As this Court has recently observed, whether a case is an impact or treatment case, the ultimate issue -- did the defendant illegally discriminate -- is the same. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988).

order to find in favor of petitioner. Instead of evaluating the ultimate factual question in light of all the evidence, the court of appeals acted as if it were the original fact finder, fundamentally at odds with its proper role.

2. The Court of Appeals Misconstrued the Burden on Plaintiff at the Third Step of the *McDonnell-Burdine* Analysis.

Assuming, *arguendo*, that the *McDonnell-Burdine* analysis could apply after the case was fully tried on the merits, the court of appeals misconstrued the burden on plaintiff at the third step of the analysis. As *Burdine* explained, a plaintiff may prove discrimination (the third step and ultimate question) by establishing a *prima facie* case (the first step) and effectively discrediting defendant's evidence of a legitimate business reason (during the second step). 450 U.S. at 255 n. 10. If, in the second step, the defendant articulates a legitimate business reason for its conduct, it may avoid immediate and automatic judgment for the plaintiff,[7] but the plaintiff is not necessarily then required to *produce any additional quantum of evidence* in order for the fact finder to find for the plaintiff on the ultimate fact question of discrimination. Whether additional evidence is required depends on the particular circumstances of each case. The court of appeals erred in requiring petitioner to produce additional evidence of discrimination, without undertaking

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[7] Although the defendant need only state a business reason and need not prove its actual motivation, it cannot merely mouth any reason, however absurd. Further, the reason must meet the plaintiff's *prima facie* case and be clearly set forth to provide the plaintiff a fair opportunity for rebuttal. *Burdine*, 450 U.S. at 254-55. Moreover, a number of courts of appeal have required defendant to prove the *intermediate* fact of the "existence" of the reason. These decisions are collected in *Harris v. Marsh*, 679 F.Supp. 1204, 1282-85 (E.D.N.C. 1987). *See* Player, "The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases," 49 Mo. L. Rev. 17 (1984).

any analysis of the evidence of discrimination before it. Quite simply, the court could not skip to the issue of pretext without first expressly finding that no rational finder of fact could have rejected Mobil's proffered business reasons. By accepting Mobil's reasons on their face, the court prevented the jury from weighing the evidence and deciding whether Mobil's reasons were legitimate or discriminatory -- or whether the reasons even existed at the time of the challenged conduct. Thus under *McDonnell-Burdine*, direct proof of pretext, separate and distinct from proof of discrimination, is not required. The court of appeals *per se* role in this case violated this principle and deprived Mitchell of his right to a trial by jury. *See and compare, Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 19 (7th Cir. 1987).

As in any case in which intent is at issue, the fact finder may consider innumerable factors in "decid[ing] which party's explanation of the employer's motivation it believes," including direct and circumstantial evidence and the credibility of witnesses. *Aikens*, 460 U.S. at 716. The jury was free to assess the credibility of Mobil's officers and conclude that their testimony about Mobil's reasons for the Plan changes were not credible. *EEOC v. Sandia*, 639 F.2d at 622-23; Player, *supra*, n.7. Even if petitioner had produced no evidence beyond that contained in his *prima facie* case of constructive discharge, the jury permissibly could have found in favor of petitioner. This Court so recognized in *Burdine*:

> In saying that the presumption [of discrimination raised by the plaintiff's *prima facie* case] drops from the case [when the defendant articulates a legitimate, nondiscriminatory business reason], we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a *prima facie* case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial

> evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

450 U.S. at 255 n.10 (emphasis added).

The court of appeals' analysis flies in the face of *Burdine*. Simply because Mobil had articulated business reasons, the court of appeals required petitioner to produce evidence of pretext in addition to that necessary to establish plaintiff's *prima facie* case. The court also ignored the cross-examination of Mobil's witnesses. The court reversed because it concluded that the petitioner had failed to satisfy a mandatory burden of production at the third step of the *McDonnell-Burdine* formula, *not* because it concluded, after reviewing the entire record, that no rational trier of fact could have found that Mobil was motivated by a discriminatory reason. The court of appeals merely *recited* Mobil's proffered business reasons and made no attempt to *evaluate* them against the evidence of discrimination in the record as a whole. If the court had made such an attempt, it would have discovered that the Plan amendments actually *exacerbated* the problems Mobil stated it was trying to avoid. *See* Part C below.

This and the preceding error both resulted from the court of appeals' ritualistic fixation on the *McDonnell-Burdine* three-step formula. The Tenth Circuit has repeatedly erred in rigidly adhering to this formulation after it has lost its significance following a full presentation of the evidence. In *EEOC v. University of Oklahoma*, 774 F.2d 999 (10th Cir. 1985), in reviewing the district court's grant of j.n.o.v. in an ADEA case, the court similarly "organized the record within the order of proof set forth" in *McDonnell-Burdine*. *Id.* at 1002. It did so in the face of Judge Seth's concurrence which correctly argued precisely what

petitioner is arguing here -- that the court's approach was expressly disapproved of by this Court in *Aikens*. *See also Branson v. Price River Coal Co.*, 853 F.2d 768 (10th Cir. 1988) (applying the *McDonnell-Burdine* three-step formula in reviewing the district court's grant of summary judgment in favor of defendant in an ADEA case after complete discovery and full briefing on the evidence of intentional discrimination). The Tenth Circuit plainly misapprehends, or simply refuses to follow, this Court's direction in *Aikens* and *Burdine*. This Court should grant certiorari to prevent the miscarriages of justice that are bound to occur in the Tenth Circuit in the future, as well as to remedy the extraordinary injustice petitioner has suffered.

3. The Court of Appeals Erred in Supplying The Defendant With A Business Reason It Did Not Rely On In Its Motion For Directed Verdict.

The precise holding of the court of appeals was that the district court erred in denying Mobil's motion for directed verdict at the close of all the evidence. That motion, however, never mentioned the plan drain and fairness business reasons the court of appeals cited in its opinion in support of the plan changes. App. 17-18. Mobil relied solely on a different reason in its directed verdict motion -- protection of improvident retirees from squandering their lump sum payments. App. 26-27. To reverse the district court, the court of appeals thus found it necessary to rely on purported business reasons that even Mobil had apparently concluded were unworthy of mention in its motion for a directed verdict!

Inexplicably, the court ignored all of this Court's decisions since *McDonnell* which require the defendant to articulate a business reason. If the defendant cannot articulate a legitimate business reason, it is grossly unfair for the court of appeals to step in and articulate one. It is not an overstatement to report that the petitioner and his counsel were amazed by the opinion of the court of appeals which described a trial quite different from the

one in which they participated. Petitioner respectfully suggests that the Tenth Circuit's gross disregard of the record resulted from a hostility to ADEA and the congressionally mandated obligations it places on employers.

C. In Conflict With Numerous Decisions of This Court, the Court of Appeals Impermissibly Sat As A Second Level Fact Finder in This Case.

Courts of appeal do not sit as finders of fact. When the district court sits as a fact finder in a bench trial, this rule reflects sensible administration of justice. When a jury is a fact finder, however, its function has constitutional significance.

This Court has clearly and consistently articulated the highly deferential and restrictive standard of review courts of appeal must apply to jury verdicts. This standard was plainly violated in this case, resulting in grave and extraordinary injustice to the petitioner. This Court should exercise its supervisory power to correct this abuse of the time-honored limitations on the authority of federal appellate courts to tamper with jury verdicts.

This Court has granted certiorari on many occasions to determine whether an appellate court overstepped its role by invading the historic function of the jury: *e.g.*, (a) *Basham v. Pennsylvania R. R. Co.*, 372 U.S. 699 (1963); (b) *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); (c) *Baker v. Texas & Pac. Ry. Co.*, 359 U.S. 227 (1959); (d) *Rogers v. Missouri Pac. R. R. Co.*, 352 U.S. 500 (1957); (e) *Lavender v. Kurn*, 327 U.S. 645 (1946); (f) *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1943); and (g) *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891). "[A]ny seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Chauffeurs,*

Teamsters & Helpers v. Terry, 494 U.S. ___, 110 S.Ct. 1339, 1345 (1990).[8]

The standard for review of a judgment upon a verdict returned by a properly instructed jury is more than deferential:

> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.[9]

Lavender, 327 U.S. at 653. *See also Commissioner v. Duberstein*, 363 U.S. 278, 290-91 (1960) ("[w]here a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue").

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[8] Many times this Court has reviewed by certiorari whether a court of appeals improperly intruded upon the trial court's fact finding function under the "clearly erroneous" standard: *e.g.*, (a) *Amadeo v. Zant*, 486 U.S. 214 (1988); (b) *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); (c) *Anderson v. Bessemer City*, 470 U.S. 564 (1985); (d) *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); (e) *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); (f) *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

[9] Jury findings are *not* subject to the "clearly erroneous" standard. Even though "some evidence" might support a district court's findings, facts found by a trial judge may be set aside as "clearly erroneous" when "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States Gypsum Co.*, 333 U.S. at 395. Jury findings, on the other hand, may *not* be

(Continued on following page)

Repetition by an appellate court of the jury's function by weighing conflicting evidence and judging witness credibility to reach an opposite factual conclusion is "an undue invasion of the jury's historic function . . . ." *Lavender,* 327 U.S. at 652-53. "[I]ndependent consideration of the totality of the circumstances . . . found in the record" is an impermissible invasion of the province of the fact finder. *Pullman-Standard,* 456 U.S. at 291.

The Tenth Circuit rummaged through the factual record in this case in startling and extraordinary disregard of the time-honored constitutional limitations on the power of appellate courts to disturb the deliberative results of juries and trial courts.

An illustration of its *de novo* fact finding was its identification of the reasons Mobil purportedly offered in justification of the lump sum strategy: "plan drain" and "fairness." As stated above, Mobil never even mentioned these reasons in its directed verdict motion at the conclusion of plaintiff's case:

> THE COURT: . . . I don't quite understand what your theory is on what the business necessity was of changing the threshold.
>
> * * *
>
> MR. TAYLOR [Mobil's counsel]: Okay. The legitimate business reason was that the original intent in 1977, when $250,000 was established, was that that be the threshold. It is not indexed for inflation: and by 1984, it was realized that 250,000 in 1977 had become much less in 1984. So in 1984, they returned to the original intent and also indexed for inflation.

(Continued from previous page)

disturbed short of a *"complete absence of probative facts* to support the conclusion reached . . . ." *Lavender,* 327 U.S. at 653 (emphasis added).

> There has been testimony as to the enormous overutilization. Virtually a hundred percent of anyone who could possibly get his hands on the lump sum was taking it, and *the company was very concerned that the people were doing this unwisely and to their financial jeopardy. They did not know how to handle the money, they would use it for current expenses and not retirement.*

App. 26-27 (emphasis added). At the close of all the evidence, Mobil merely renewed this motion without further argument. App. 30-31. The foregoing "improvident investor" justification was thus the *only* reason relied on by Mobil in its motion at the close of all the evidence which the court of appeals held the district court should have granted. Mobil's primary argument in closing was that it amended the plan to protect people with less than $250,000 in 1977 dollars in net worth or plan value because they "did not know how to handle the money" and Mobil did not want to run "the risk of getting blamed, if its retirees become public wards, or become destitute, or become unable to support themselves." R. Vol. XI at 1010.

Although Mobil had floated "plan drain" and "fairness" as trial balloons, these reasons were so discredited by cross-examination that Mobil's counsel apparently decided not to assert them in the motion for directed verdict. However, as grounds for reversal, the court of appeals reached *behind* that motion and revived business reasons effectively abandoned by Mobil's counsel at trial.

The court's selection of financial drain on the plan as a reason disregards testimony of Mobil officers who expressly *denied* that any so-called "plan drain" had any bearing on the changes. Rex Adams, the only witness called by Mobil, denied that the threshold change had any connection with financial drain on the plan.

> Q Will you agree, Mr. Adams, that in 1983 and 1984 that you didn't go to the threshold and you did not go to the five to nine and a half percent

> because there wasn't enough money in the fund?
>
> A No, sir, I said it was not driven by cost considerations, to the threshold question.
>
> Q 144 percent funded in 1984?
>
> A Yes, I think that's correct.

R. Vol. X at 931.

> Q Now the rationale for this threshold [change] was really the amount of money coming out of the plan, wasn't it?
>
> A No, sir. I've tried to tell you that the rationale for the threshold was the very pronounced philosophy and belief of our Executive Committee that the normal form of pension should be annuity form. They were concerned that people taking the annuity form -- I mean the lump sum form, if they didn't have large financial resources to absorb that investment risk.

R. Vol. III at 290-91. Mobil's lawyers acknowledged on the record that Adams "never testified that the [plan] fund was threatened." R. Vol. III at 232. Also Mobil officers acknowledged that raising the discount rate alone would adequately address plan drain. Mobil's own actuary testified that the only "drain" on the plan of concern to the company was the drain resulting from the massive accelerated retirements of lump sum recipients constructively discharged by the plan changes. R. Vol. VIII at 759. The window, therefore, exacerbated the claimed problem of "drain". That undisputed fact is itself evidence of pretext. Inst. No. 13 ¶C.(1), App. 49-50.

Nor could "fairness" of the window constitute a nondiscriminatory reason. The court of appeals recognized that it was the *combination* of the threshold increase and the window which led to the constructive discharge of petitioner and others. Constructive discharge presupposes intentional discrimination. *Spulak v. K-Mart Corp.*, 894 F.2d 1150, 1151 (10th Cir. 1990). Thus the "window" was shown by Mitchell in his prima facie case to be a

"trap door" and can hardly be viewed as nondiscriminatory. It makes no legal or common sense to point simultaneously to the same plan amendment as a reason which both supports *and* rebuts plaintiff's prima facie case.

As to the "improvident investor" purpose, the lump sum strategy not only *did not* carry out this "purpose" *but*, to the contrary, *knowingly accomplished the exact opposite result* -- the mass exodus of more than 1,000 employees with less than $250,000 in 1977 dollars. As the cross-examination of Adams revealed:

> Q The bottomline is that by enacting this plan, a thousand people went out into the marketplace, and took the risk of inflation and took the investment risk, as you have described it, with less money than they would have had, had they been able to stay in Mobil?
>
> A In most cases, that's the case.

R. Vol. X at 933-38. Pretext is also shown when the challenged practice does not further the reason proffered. See Inst. No. 13, ¶C.(1), App. 49-50.

As to the Superior Oil merger, the panel concluded that since Mobil talked about the lump sum strategy some three or so weeks before a date which Mitchell could prove with *direct* evidence that the company had begun consideration of the Superior merger, no reasonable juror could possibly infer that the strategy was adopted in anticipation of the $5.7 billion merger. The actual sequence of events shown by undisputed evidence revealed the following facts. Mobil began consideration of the plan amendments, with the retirement window, no later than January 1984. On February 2, 1984, Mobil's Executive Committee discussed "at length" the acquisition of Superior Oil ("Project Styx"). Exh. 177. The court belittled this evidence by saying that the record did not disclose what "at length" meant, implying that without direct evidence, no reasonable person could infer that the deal could have been under consideration for several weeks. App. 19 n.4.

The court of appeals then engaged in *de novo* fact finding by characterizing the documentary evidence. Mobil did not *adopt* any plan amendments on February 9, 1984 as the appellate court found as a matter of fact. Mobil documents proved that for at least four more months the amendments were only considered proposals. Adams testified more than once that the changes were not *adopted* until June 13, 1984. R. Vol. III at 288, 295, & 393 ("Our plan amendments were adopted by Executive Committee in June '84").

On March 11, 1984, Mobil executed the agreement by which it agreed to acquire Superior Oil and to guarantee Superior's employees substantial severance benefits if they were not retained. In April 1984, Mobil's Employee Relations executives were advised that if they pursued the proposed changes in the lump sum eligibility requirement with the retirement window, approximately 1,300 "vulnerable," older employees would be forced out of their jobs [Exh. 229], and that a voluntary early retirement program should be considered in lieu of the "lump sum strategy" [Exh. 230]. Mobil's own benefit staff proposed an alternative voluntary early retirement program to avoid ADEA problems. Exh. 114 at 21-22.

Regardless of whether Mobil's executives knew in January 1984 that the Superior Oil transaction would occur, they did adopt a discriminatory policy *after* they were told in April 1984 of the exodus of older employees and the risk of ADEA claims that would result from the changes. The panel *erroneously ignored all the events* between February and June 1984, even though the plan amendments and retirement window were not adopted before June 1984, nor announced to employees until July 2, 1984.

Additionally, the court ignored evidence that, throughout the 1980's, Mobil had been burdened by excessive staff and a program of "organizational streamlining" had "been underway since 1981." Exh. 59 at 3; R. Vol. II at 159-60. A December 1983 memorandum showed

a long standing "company policy" designed "to encourage employees to leave." Whether over-staffing issues are considered in connection with the Superior Oil merger or quite apart from it, there was ample evidence allowing the jury to infer that Mobil's conduct was discriminatory and that its avowed justifications were pretexts. Even without Superior, the jury was well within its province to find that Mobil used the amendments to lop off an extensive portion of its payroll without paying early retirement incentives. The average savings in salary alone to Mobil was over $49,000 per employee, a total present value savings in 1984 of almost $300 million -- this figure *excludes* benefits worth an additional $100 million. Exh. 114 at 21-22; Exh. 230.

Testimony concerning Mobil's corporate rejection of early retirement programs (with "carrot" financial incentives) also constituted compelling evidence of discrimination. Mobil officers testified that the corporation rejected the concept of early retirement programs on a policy level due to lack of control over who decides to leave. Those same officials, however, admitted on the stand that the lump sum strategy entailed the very same lack of control. R. Vol. IX at 923. Mobil implemented this strategy, knowing that more than 1,000 senior employees would be forced out and conscious that the strategy would avoid the enormous costs of a lawful early retirement program with economic incentives. Thus the finder of fact could determine that Mobil adopted the lump sum strategy to rid the company of senior employees without having to incur the extra expense which might have made the changes legal.

Other evidence destroyed Mobil's credibility. As Mobil's own studies predicted, the strategy it chose, among various alternatives, had the greatest discriminatory impact. Similarly, an amendment permitting a waiver of the higher threshold requirement mandated by the IRS was not revealed by Mobil until months after the mass exodus of senior employees. The trial court found that this waiver provision was deliberately concealed

from the employees. App. 35-36. The list goes on, but space limitations prevent further recitation here.

The Tenth Circuit also ignored Mitchell's substantial direct evidence of discrimination. The lump sum strategy was *not* a facially neutral policy but could only, as the Tenth Circuit recognized, adversely affect persons 55 years of age or older. In the face of direct evidence of discrimination, the three-step analysis utilized by the court below does not even apply. *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

The jury, pursuant to Instruction No. 13, necessarily found that age was not only *"a"* determining factor but *"the"* determining factor in the challenged employment practice. See Inst. No. 13, App. 49. That finding, alone, called for appellate affirmation of the ADEA judgment. The jury found that Mobil's ADEA violation was willful, a finding of a knowing violation for purposes of evaluating the evidence to sustain petitioner's verdict. *See* Instruction No. 16, App. 50.

By ignoring the foregoing direct evidence and searching the record for indirect evidence that Mobil's business justifications were "unworthy of credence," the Tenth Circuit revealed its misunderstanding of pretext in discrimination cases and trespassed into the fact finder's realm. These glaring errors should be corrected by this Court and justice restored to petitioner. As this Court has forcefully stated:

> [T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the [factfinder] that their account is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merit's should be "the 'main event' . . . rather than a tryout on the road.' "

Anderson v. Bessemer City, 470 U.S. at 575 (citation omitted).

D. The Court of Appeals Improperly Denied Mitchell Standing Under ERISA and Eviscerated the Act's Purposes By Refusing a Remedy to Persons Duped Into Involuntary Retirement for the Purpose of Interfering With Their Attainment of Rights Under the Plan.

The trial court found in favor of Mitchell on his ERISA claims (App. 32-40), and then relying on the parties' stipulation that actual reinstatement of Mitchell was impractical, awarded money damages or restitution as the equitable equivalent.

The court of appeals applied *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and held that Mitchell had no standing to pursue ERISA remedies because he was not a "participant" under 29 U.S.C. § 1002(7) since: (1) he had not claimed Mobil improperly withheld "vested benefits" and thus he lacked a "colorable" claim for standing purposes; (2) his claim for future (not yet vested) benefits was for compensatory damages; and (3) he did not have a reasonable expectation of returning to covered employment since he did not seek reinstatement.

Again, the court ignored the factual record. Petitioner clearly requested reinstatement and its equitable equivalent in the trial pleadings, including the Stipulated Pretrial Order. In fact, Mobil agreed that reinstatement was impractical and stipulated to the amount of wages and benefits Mitchell would have realized.

The opinion is flawed for other reasons. First, ERISA allows redress for all violations of its provisions, not just violations which lead to a present loss of vested benefits. 29 U.S.C. § 1132(a)(1)(b) & (a)(3) (enforce all rights and redress all violations); *Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990) (no loss of vested benefit only consequential damages); *Zipf v. American Tel. & Tel. Co.*,

799 F.2d 889, 893 (3d Cir. 1986) (a mere potential for receiving benefits); *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238, 1243 (7th Cir. 1983) (future attainment of a right to a benefit under a plan); *Bradley v. Capital Eng'g & Mfg. Co.*, 678 F. Supp. 1330, 1336 (N.D. Ill. 1988) (future attainment of medical benefits from a vested plan). To restrict ERISA remedies to vested benefits for § 510 violations only, as the Court of Appeals did, eviscerates its broad remedial purpose. Section 510 of ERISA protects from interference any right to which the participant *may* become entitled.

Second, *McLenden v. Continental Can Co.*, No. 89-5596 (3d Cir. 1990), reaffirms the principle that individuals who lose their jobs due to ERISA violations have viable claims to the benefits they would have attained but for the violation. Slip op. at ___ (Westlaw at page 2). *See also Boesl v. Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1515 (N.D. Ill. 1986) (ERISA gives courts equitable power to return a wrongfully discharged employee to the position he enjoyed prior to his discharge). The Tenth Circuit has, contrary to authority in other circuits, legitimized Mobil's wrongful, constructive discharge of Mitchell who would have been able to attain future benefits from its plan and immunized it from § 510 liability. This result is especially intolerable in light of the trial court's ruling that ERISA preempted Mitchell's common law claims.

Third, Mitchell did seek reinstatement, both through internal appeals and this action. Contrary to the *de novo* finding of the court of appeals, petitioner did not merely "protest" Mobil's conduct but was found to have been forced into early retirement, negating any voluntariness in accepting the discounted lump sum. Given these factors, petitioner met the *Firestone* "colorable" claim to vested benefits standing requirement. Further, petitioner clearly "prevailed in a suit for benefits" as found by the trial court and thus met both prongs of the "colorable" claim test. *Firestone*, 109 S. Ct. at 958.

Finally, the court's denial of standing because Mitchell was awarded "compensatory damages" rather than "vested benefits" is factually wrong and in direct conflict with decisions of other circuit and district courts. Petitioner sought, and the trial court awarded, the equitable equivalent of reinstatement: back pay and benefits which would have been earned had there been no ERISA violations. In doing so, the Tenth Circuit aligned itself with other circuits which have refused to confer standing on anyone but those specifically seeking "vested benefits." *See e.g., Kuntz v. Reese*, 785 F.2d 1410, 1411 (4th Cir.), *cert. denied*, 479 U.S. 916 (1986).

In contrast, the Sixth Circuit has recently joined the Third Circuit and district courts of the Seventh Circuit, and has held that compensatory damages are recoverable under ERISA. *Warren*, 905 F.2d at ___ (Westlaw at page 24). *See also Zipf*, 799 F.2d at 890; *Boesl*, 642 F. Supp. at 1515. These courts have agreed with Justice Brennan's concurrence in *Russell* that the broad grant of equitable powers in ERISA must include the power to award non-benefit equitable remedies in order to give effect to Congress' directive to effectively "redress" violations of all ERISA's provisions. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 157 (1985) (Brennan, J., concurring).

Only this interpretation can redress interference with the attainment of "any right to which the participant may become entitled," where the "right" denied is something other than a vested benefit. *See* 29 U.S.C. § 1140; 29 U.S.C. § 1054(g). The definition of "participant" and thus standing must turn on a meaning which allows full enforcement of § 510 of ERISA.

CONCLUSION

Petitioner respectfully urges this Court to grant his petition for a writ of certiorari to the Tenth Circuit Court of Appeals to review the decision below and bring it into conformity with decisions of this Court and to exercise its

supervisory power to rectify the court of appeals' action in excess of its limited role in reviewing the fact findings of a correctly instructed jury.

Respectfully submitted,

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Dated this 15th day of August 1990.

APPENDIX A

[AS PUBLISHED IN 896 F.2d 463]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL, Plaintiff-Appellee/ Cross-Appellant, v. MOBIL OIL CORPORATION, a New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; and TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, Defendants-Appellants/ Cross-Appellees.	Nos. 89-1019, 89-1031, 89-1085, 89-1111 (Filed February 16, 1990)
ERISA INDUSTRY COMMITTEE and ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, Amici Curiae.	

Appeal from the United States District Court
for the District of Colorado
D.C. No. 86-Z-585

Rodney Patula (Thomas L. Roberts, Peter H. Ziemke, W. Randolph Barnhart, and Peter W. Pryor, with him on the

briefs) of Pryor, Carney & Johnson, Englewood, Colo., for plaintiff-appellee/cross-appellant.

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Harris Weinstein, John M. Vine, and Dwight C. Smith III of Covington & Burling, Washington, D.C., for Amicus Curiae Erisa Industry Committee.

Paul J. Ondrasik, Melanie Franco Nussdorf, Suzanne E. Meeker, and Theodore E. Rhodes of Steptoe & Johnson, Washington, D.C., for Amicus Curiae Ass'n of Private Pension and Welfare Plans.

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

JOHN P. MOORE, Circuit Judge.

In this case, the Mobil Oil Corporation and one of its former employees, Porter Mitchell, dispute whether changes which Mobil made in its employee benefit plan

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*The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. At trial, Mr. Mitchell succeeded on his age-discrimination and ERISA claims. Mobil challenges the results below, claiming that Mr. Mitchell did not meet his burden of proof on the age-discrimination claim and that he did not have standing to seek relief under ERISA. We agree with Mobil and reverse.

I. FACTS

Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retirement plan, the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984 (the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump-sum in excess of $250,000.

In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new threshold to the Consumer Price Index (CPI), projecting a rise in the

threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Porter Mitchell was one of Mobil's employees who had to make such a choice. He was fifty-six at the time Mobil amended the eligibility criteria for the lump-sum option and had elected to take this option instead of the annuity. He was clearly eligible for the lump-sum option under the $250,000 threshold but was uncertain whether he would be able to meet the $450,000 threshold since it could rise, prior to his retirement, with changes in the CPI. This choice was important to Mr. Mitchell because at the time he was making it, the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity.

At trial, Mr. Mitchell claimed that by forcing him to make this choice, Mobil had willfully violated the ADEA since it had, in effect, constructively discharged him because of his age. He also claimed that Mobil had breached its fiduciary duties under ERISA and that it had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum option, an accrued benefit. The age-discrimination and ERISA claims were tried jointly before a jury, though,

the trial court reserved for itself a decision on the ERISA claims.

The jury returned a verdict in favor of Mr. Mitchell, awarding $405,962.76 in back-pay damages; $86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, $96,740.82 in front-pay damages. Because the jury found that Mobil's violation of the ADEA was willful, the trial court awarded Mr. Mitchell $405,962.76 in liquidated damages as well. The court rejected Mr. Mitchell's claim for prejudgment interest on his ADEA claim. The trial court also ruled in favor of Mr. Mitchell on his ERISA claims, awarding him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil appeals both the jury's verdict and the trial court's judgment. Mr. Mitchell cross-appeals the trial court's measure of damages.

II. THE ADEA CLAIM

A. MR. MITCHELL'S PRIMA FACIE CASE

The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a prima facie case of age discrimination by constructive discharge, an employee must prove that his "employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986). An employee who claims that an offer of early

retirement constitutes age discrimination by constructive discharge can meet this burden by demonstrating that the offer "sufficiently alters the status quo that each choice facing the employee makes him worse off" and that if he refuses the offer and decides to stay, his employer will treat him less favorably than other employees because of his age. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 109 S. Ct. 260, 102 L.Ed.2d 248 (1988). An early retirement program which requires an employee to make the difficult choice between retirement with the receipt of previously unavailable incentives and continued work under the same conditions, however, does not result in constructive discharge because the employee is no worse off whichever option the employee chooses. *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964, 108 S. Ct. 454, 98 L.Ed.2d 394 (1987); *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988).

Mobil claims that since Mr. Mitchell did not establish a prima facie case of age discrimination by constructive discharge, the trial court erred in rejecting its motion for a directed verdict on the ADEA claim. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman v. First Federal Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988).

Mobil first contends that the trial court erred in denying its motion for a directed verdict because *Derr* precludes recovery for violations of the ADEA absent a showing that an employer subjected its employee to difficult or intolerable working conditions. 796 F.2d at 344.

Mr. Mitchell himself admitted at trial that his working conditions were not unpleasant, that he was well regarded by his superiors, and that he enjoyed his work at Mobil. The fact that Mr. Mitchell was happy at Mobil and worked harmoniously with his colleagues and superiors, however, does not preclude a finding that Mobil's offer of early retirement constituted age discrimination by constructive discharge. The relevant question in this case is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo.

Mobil contends that it did not confront Mr. Mitchell with such a choice. Instead, it gave him an extra benefit unavailable to employees under the age of fifty-five, the choice to elect the lump-sum option at the $250,000 threshold. Mobil's argument is disingenuous. Its program, unlike that in *Henn*, 819 F.2d at 826, did not give Mr. Mitchell a choice between the receipt of a previously unavailable early retirement incentive and the continuation of work under the status quo which preceded the offer of early retirement. Instead, Mobil created a choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan. One choice would permit Mr. Mitchell to retire by February 1, 1985, at the age of fifty-six, and receive the lump-sum option under the old eligibility criteria. Prior to Mobil's amending the Plan, however, Mr. Mitchell could have worked until the age of sixty-five and still remain eligible for the lump-sum option under the old criteria. The other choice would permit Mr. Mitchell to continue working, but whereas prior to the Plan's

amendment he could be certain to qualify for the lump-sum option, now, because Mobil had increased the threshold and linked it to the CPI, he would have to requalify for this benefit for which he had already become eligible at the age of fifty-five. Moreover, he would never be certain that he could achieve the potentially increasing threshold by retirement age.

As Mobil points out, to establish a prima facie case of age discrimination by constructive discharge, Mr. Mitchell had to prove not only that Mobil confronted him with a choice between two evils but also that Mobil would have treated him and other older employees less favorably, because of their age, had they remained on the job. Mobil asserts that since all employees were subject to the new eligibility criteria, Mr. Mitchell cannot demonstrate that the amendment of the Plan adversely affected him because of his age. Like Mr. Mitchell, employees under the age of fifty-five who had accumulated pension benefits in excess of $250,000, but less than $450,000, or who had a net worth of between $250,000 and $450,000, also lost the opportunity to obtain the lump-sum benefit under the old criteria. Indeed, for this group of employees that opportunity was irretrievably lost, whereas Mr. Mitchell could still take advantage of it if he chose to retire prior to February 1, 1985.

Mobil's argument ignores the Plan's requirement that an employee be over the age of fifty-five before he can qualify for the lump-sum benefit. Although Mobil's employees who were under age fifty-five at the time Mobil amended the eligibility criteria might have expected to obtain the lump-sum benefit, none of them qualified for it at that time; consequently, only employees

over the age of fifty-five who had already qualified to receive the lump-sum benefit, like Mr. Mitchell, would have to *requalify* for it under the new eligibility criteria if they decided to stay on the job. Since Mr. Mitchell did establish, as a matter of law, that he had been constructively discharged because of his age, the trial court properly denied Mobil's motion for a directed verdict.

B. THE JURY CHARGE ON MR. MITCHELL'S PRIMA FACIE CASE

This court will find reversible error in a trial court's jury instructions only if we have substantial doubt whether the instructions, taken together, properly guided the jury in its deliberations. *Lutz v. Weld County School Dist. No. 6*, 784 F.2d 340, 341 (10th Cir. 1988). The paradigmatic instruction on the element of intolerability in a constructive discharge case is "whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr*, 796 F.2d at 344. A trial court should, however, tailor this instruction to fit the facts of the case. *See Paolillo v. Dresser Indus., Inc.*, 865 F.2d 37, 40 (2d Cir. 1989).[1]

Mobil contends that the trial court made two errors in its constructive discharge instructions. First, the court

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[1] Indeed, trial judges should always avoid verbatim adoption of language from appellate opinions to formulate instructions. That which is meaningful to those with a legal education is often lost upon others; therefore, a carefully crafted instruction always is tailored to fit the case in language non-lawyers will comprehend.

did not require the jury to find, as stated in *Derr*, that Mr. Mitchell's working conditions were intolerable or difficult. Instead, the court instructed the jury that it could find constructive discharge by forced retirement if "a reasonable person would also have felt compelled to retire under the circumstances with which Mr. Mitchell was faced in 1984 and 1985." We have no doubt that this instruction properly guided the jury in its deliberations. An instruction patterned after the *Derr* paradigm is particularly apt in cases where an employee, who is a member of a protected class, claims that an employer forced the employee to resign by creating on-the-job conditions directed specifically at that employee. It is less suitable where, as here, an employee claims that the employer's offer of early retirement constitutes age discrimination by constructive discharge. The instruction given takes this distinction into account and is, therefore, properly tailored to the facts of the case.

Mobil also assigns as error the trial court's failure to require the jury to find a link between the choice which Mobil imposed upon Mr. Mitchell by amending the Plan and Mr. Mitchell's age. It specifically objects to the following instruction:

> [T]o take early retirement constructive discharge, one, if the decision is induced by withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire, or, two, if each choice facing the employee as a result of the change in the threshold provisions of the retirement plan leaves him worse off than before.[2]

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[2] The Association of Private Pension and Welfare Plans, as *amicus curiae*, asserts that the first alternative in this jury

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Mobil ignores, however, the trial court's preliminary instruction that Mr. Mitchell "must prove that Mobil's specific employment practices or policies adversely affected people in his age group at a substantially higher rate than they affected those in younger age groups." Since these instructions, taken together, properly state the law governing this case, we reject Mobil's claim that the trial court improperly instructed the jury.

C. RETROACTIVE APPLICATION OF PUBLIC EMPLOYEES RETIREMENT SYSTEM OF *OHIO V. BETTS*

After trial and after Mr. Mitchell filed his Reply Brief, the Supreme Court decided *Public Employees Retirement Sys. of Ohio v. Betts*, ___ U.S. ___, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989), which redefined the elements of a prima facie case of age discrimination based on changes in an employer's benefits plan by reinterpreting § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section exempts

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charge would effectively outlaw voluntary early retirement programs by prohibiting employers from offering special incentives that will not be available to those who choose to remain employed. Read out of context, the jury charge does support this interpretation which would misstate the law. When the jury instructions are read as a whole, however, the trial court's reference to the "withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire" clearly addresses those situations in which the employer uses a stick, the reduction or withholding of benefits to which the employee was entitled prior to the offer of early retirement, to force employees to accept an offer of early retirement.

from liability under the ADEA any employer who "observe[s] the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. Prior to *Betts*, this court and several other courts of appeal held that an employer had the burden of establishing as an affirmative defense that its early retirement program fell within the exemption of § 4(f)(2) by proving that (1) its plan was bona fide; (2) its actions were in observance of the terms of the plan; and, (3) its plan was not a subterfuge to evade the purposes of the Act. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 n.2 (10th Cir. 1988); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir. 1983), *cert. denied*, 469 U.S. 820, 105 S. Ct. 92, 83 L.Ed.2d 38 (1984); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S. Ct. 2038, 100 L.Ed.2d 622 (1988). An employer could disprove subterfuge by showing a cost-based justification for age-related reductions in benefits. *See Karlen*, 837 F.2d at 319; *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1492 (3d Cir. 1988); 29 C.F.R. § 860.120(a)(l),(d)(1)-(3) (1980), redesignated 29 C.F.R. § 1625.10(a)(l),(d)(1)-(3) (1988).

The *Betts* court implicitly overruled this prior case law. It held that § 4(f)(2) is not an affirmative defense which the employer has the burden of proving, but rather part of the plaintiff's prima facie case. 109 S. Ct. at 2868. Under *Betts*, an employee who claims that his employer's benefits program violates the ADEA bears the burden of proving subterfuge by showing "that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship," such as hiring and firing or wages and salaries. *Id.* We must now determine

whether, as Mobil contends, *Betts* should be retroactively applied to this case.

Our determination whether to apply *Betts* retroactively requires the weighing of three factors: (1) whether *Betts* "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether, after looking at the prior history of the *Betts* rule and at its purpose and effect, "retrospective operation will further or retard its operation"; and, (3) whether retroactive application of the *Betts* rule would be inequitable. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) (citations omitted). Each factor need not compel prospective application. *Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458, 1460 (10th Cir. 1985). Where, for example, a decision " 'could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' " *Chevron*, 404 U.S. at 107, 92 S. Ct. at 355 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S. Ct. 1897, 1900, 23 L.Ed.2d 647 (1969) (per curiam)).

Betts clearly established a new principle of law by transforming what had been an affirmative defense into an element of an employee's prima facie case. Prior to *Betts*, every circuit which addressed the applicability of § 4(f)(2) to claims of age discrimination in employee benefit programs viewed it as an affirmative defense. *Potenze v. New York Shipping Ass'n, Inc.*, 804 F.2d 235, 237 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1955, 95 L.Ed.2d 528 (1987); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988); *Crosland v. Charlotte Eye, Ear*

and Throat Hosp., 686 F.2d 208, 211 (4th Cir. 1982); *Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F.2d 692, 694-95 (6th Cir. 1988), *rev'd sub nom. Public Employees Retirement Sys. of Ohio v. Betts*, ___ U.S. ___, 109 S. Ct. 2854, 106 L.Ed.2d 134 (1989); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S. Ct. 2038, 100 L.Ed.2d 622 (1988); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 (10th Cir. 1988). None even considered that § 4(f)(2) established an element of plaintiff's prima facie case. This *Chevron* factor, therefore, strongly favors nonretroactive application of *Betts*.

Retroactive application of *Betts* in this case would not further the purpose behind its new interpretation of § 4(f)(2): to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship." 109 S. Ct. at 2866. Mr. Mitchell asserts that Mobil constructively discharged him because of his age by manipulating the availability of the lump-sum benefit. In other words, Mr. Mitchell claims that Mobil used its benefit plan to discriminate against him in a nonfringe-benefit aspect of the employment relationship. His claim is exactly the type from which the *Betts* court did not intend to insulate employers. Retroactively applying *Betts*, however, would, in effect, insulate Mobil from Mr. Mitchell's claim because Mr. Mitchell did not present as part of his prima facie case evidence of Mobil's intent to use the amendment of the lump-sum provision to discriminate against him in a nonfringe-benefit aspect of the employment relationship. The second *Chevron* factor, therefore, also weighs against retroactive application of *Betts*.

Considerations of equity also undercut Mobil's contention that *Betts* should be applied retroactively. Mobil first mentioned § 4(f)(2) in its Reply Brief, filed just over two weeks after *Betts* was decided. Despite the fact that § 4(f)(2) was available to Mobil as an affirmative defense prior to *Betts*, Mobil did not plead that defense in its Answer or in its Answer to the Amended Complaint. Not surprisingly, Mr. Mitchell presented no evidence at trial on the applicability of § 4(f)(2) to his claims, nor did Mobil. Since this case proceeded for over three years prior to Mobil's filing its Reply Brief – through discovery, trial, and initial briefing on appeal – without any mention of § 4(f)(2) as an affirmative defense for Mobil, it would work a grave injustice for us to hold that *Betts* applies retroactively.[3] This result is one which we must avoid.

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[3] In *Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir. 1989), the Ninth Circuit applied *Betts* retroactively without resorting to the *Chevron* inquiry. In that case, Mr. Robinson, an employee of the County of Fresno, claimed that a modification to the County's retirement plan violated the ADEA because it resulted in his receiving a smaller pension than other retirees who were younger at the time of hiring. *Id.* at 445. The Ninth Circuit affirmed the district court's granting of the County's motion for summary judgment because Mr. Robinson had not established, as *Betts* requires, that the county intended the modification to the plan to discriminate against him in an aspect of the employment relationship unrelated to fringe benefits. *Id.* at 447.

We believe that even if the Ninth Circuit had applied the *Chevron* test, the result would have been the same. *Robinson*, nonetheless, is distinguishable from this case. Mr. Robinson did not assert, as Mr. Mitchell does, that the modification to the County's plan discriminated against him in a nonfringe-benefit aspect of the employment relationship such as hiring

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D. MOBIL'S BUSINESS JUSTIFICATION AND MR. MITCHELL'S CLAIM OF PRETEXT

If an employee establishes his prima facie case of age discrimination by constructive discharge, the employer then has the opportunity to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory business reason for its conduct. *EEOC v. University of Oklahoma*, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S. Ct. 1637, 90 L.Ed.2d 183 (1986); *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S. Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982). To prevail, the employee must then prove that the employer's proffered justification is "a mere pretext for discrimination." *Teal*, 457 U.S. at 447, 102 S. Ct. at 2530. The employee can establish pretext "by showing that the employer's proffered explanation is unworthy of credence." *University of Oklahoma*, 774 F.2d at 1002.

Mobil claims that since it forwarded a legitimate business justification and Mr. Mitchell failed to prove that it was a pretext, the trial court erred in denying its motion for a directed verdict. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be

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and firing or wages and salaries. A refusal to apply *Betts* retroactively, therefore, would have retarded the purpose behind that decision. In addition, since *Robinson* was only at the summary judgment stage at the time *Betts* was decided, applying *Betts* retroactively would not result in the high degree of injustice which retroactive application would cause in this case.

drawn therefrom point but one way, in favor of the moving party. *Zimmerman*, 848 F.2d at 1051. Alternatively, Mobil claims that the evidence was insufficient to support the jury's finding in favor of Mr. Mitchell on this issue. We will uphold the jury's verdict unless it is clearly erroneous, or there is a lack of evidence to support it. *Colorado Coal Furnace Distribs. v. Prill Mfg.*, 605 F.2d 499, 502 (10th Cir. 1979).

At trial, Mr. Mitchell claimed that Mobil's raising the eligibility threshold for the lump sum from $250,000 to $450,000 and linking it to the CPI combined with its delaying for six months the effective date of these changes forced him to choose early retirement, resulting in age discrimination by constructive discharge. Mobil introduced evidence to justify both of these amendments to the Plan. It claimed that because inflation had eroded the real dollar value of the $250,000 threshold, which had been set in 1977, the number of employees who were eligible for, and taking advantage of, the lump-sum option had increased dramatically, creating a serious drain on Mobil's pension fund. By increasing the threshold to $450,000, and linking it to the CPI, Mobil would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation. These changes in turn would stop the drain on Mobil's pension plan resulting from the overutilization of the lump-sum option.

Mobil claimed that it delayed the effective date of these changes, rather than implementing them immediately, out of fairness to its employees. The six-month notice period would give Mobil employees an adequate

transition period to consider their choice rather than simply pulling the rug out from under them. It would also give retiring employees, who were earning their peak salaries, six months to accrue additional pension benefits since Mobil calculated these benefits based on a retiring employee's highest average salary over a period of thirty-six months.

At trial, Mr. Mitchell asserted that these justifications were unworthy of credence. He contended that Mobil amended the Plan in the manner it did to force the retirement of older Mobil employees who would become redundant as a result of an impending merger with Superior Oil Company. Mr. Mitchell asserted that Mobil needed to force these employees into early retirement to avoid large severance payments which the merger agreement required it to make to Superior employees laid off as a result of the merger. Mobil could achieve this objective only by combining an increase in the threshold with a notice period during which employees would be forced to retire early to obtain the lump-sum benefit.

Mr. Mitchell contends that several circumstances which he proved support his claim of pretext. In September 1983, mid-level Mobil executives began considering alternatives to the $250,000 threshold. In mid-December, the Mobil executive primarily responsible for changes to the Plan informed his superior – the Vice President for Employee Relations, who was also a member of the Executive Committee of Mobil's Board of Directors – that an increase in the threshold would require notice to employees and a transition plan to control the accelerated retirements of employees eligible for the lump sum. On January 9, 1984, the Executive Committee requested the

Vice President for Employee Relations to continue the evaluation of an increase in the threshold and directed him to incorporate into future proposals for change a reasonable transition period between the announcement of the increased threshold and its effective date during which employees could take advantage of the old eligibility criteria.

On February 9, 1984, Mobil's Executive Committee adopted the increase in the threshold to $450,000 and linked it to the CPI. It also decided to give employees at least six months' notice of this change so they could retire and obtain the lump sum under the old eligibility requirements. The Executive Committee recognized that the announcement of an increase in the threshold approximately six months prior to the effective date of the change would lead to the early retirement of between 1000 and 1300 employees.

One week prior to its February 9 meeting, the Executive Committee reviewed "at length"[4] the possibility of a merger with Superior and authorized Mobil's President to proceed with negotiations. Mr. Mitchell contends that because the Executive Committee reviewed the opportunity to merge with Superior at length on February 2, 1984, one can reasonably infer that the Executive Committee knew about the redundancy problem which would

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[4] *See* "Excerpt from Minutes of Executive Committee Meeting held on Thursday, February 2, 1984." (Addendum to Brief of Mobil Oil Corporation, Plaintiff's Exhibit 177). The term "at length" is not defined in the minutes, and we find no other description in the record indicating the length of the review or what it entailed.

result from the merger prior to January 9, 1984, when it directed the Vice President for Employee Relations to incorporate a notice period into any future proposals for changes to the Plan. Mr. Mitchell produced no evidence to support this inference, however, and the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan. In fact, the evidence points the other way since the Executive Committee adopted the transition period just one week after it authorized Mobil's President to negotiate with Superior and over one month before Mobil and Superior signed the merger agreement. The inference which Mr. Mitchell asks us to draw, therefore, is not a reasonable one, and his claim of pretext must fail. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 895 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S. Ct. 390, 70 L.Ed.2d 208 (1981)) ("An inference is reasonable where 'there is a reasonable probability that the conclusion flows from the proven facts.' ")

Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA, we need not review Mr. Mitchell's cross-appeal on issues relating to the measure of damages.

III. THE ERISA CLAIMS

At trial, Mr. Mitchell claimed that Mobil's amendments to the Plan violated both § 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from reducing the accrued benefits of participants in a benefit plan, and § 510 of ERISA, 29 U.S.C. § 1140, which prohibits an employer from discriminating against a participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Mr. Mitchell also claimed that Mobil breached its duty as the fiduciary of the Plan by amending the Plan in the manner that it did. After determining that Mr. Mitchell met ERISA's requirements for standing, the district court held in his favor on all of his ERISA claims and awarded him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil challenges the district court's conclusion that Mr. Mitchell had standing as well as its holdings in his favor. Since Mobil's appeal involves pure questions of law, our review of the trial court's holdings is *de novo*. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988).

ERISA and its legislative history emphasize Congress's intent to provide those protected by the Act "ready access to the federal courts," 29 U.S.C. § 1001(b), and liberal remedies. *See* S. Rep. No. 127 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4838, 4871,[5] H.R. Rep. No. 533, 93d Cong., 2d Sess.,

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[5] This report of the Senate Labor and Public Welfare Committee states:

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reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4647.[6] Although the Act has a broad remedial purpose, only participants, beneficiaries, and fiduciaries of an employee benefit plan may avail themselves of its protections. 29 U.S.C. § 1132(a). This limitation on the group of potential claimants is necessary to avoid the creation of uncertainties about an employer's obligations under ERISA and to prevent the imposition of "great costs on pension plans for no legislative purpose." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

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> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and *participants and beneficiaries* with broad remedies for redressing or preventing violations of the [Act]. . . . The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits *due participants*.

(Emphasis added.)

[6] This report of the House Committee on Education and Labor states:

> [T]he Committee recognizes the absolute need that safeguards for *plan participants* be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which [inequities] have resulted in tragic hardship to so many.

(Emphasis added.)

ERISA defines a "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). This definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___, 109 S. Ct. 948, 958, 103 L.Ed.2d 80 (1989) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S. Ct. 318, 93 L.Ed.2d 291 (1986)). It excludes, however, former employees who have received a lump-sum payment of all their vested benefits because "these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S. Ct. 526, 88 L.Ed.2d 458 (1985). These claimants seek a damage award, not vested benefits improperly withheld. *Kuntz*, 785 F.2d at 1411. The fact that an employee takes his lump sum under protest does not preserve his standing as long as an employer properly pays out all the vested benefits owed to the employee. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir. 1985).

Mobil claims that the trial court erred in granting Mr. Mitchell standing because he has never had a reasonable expectation of returning to covered employment, nor does he have a colorable claim to vested benefits. We agree. After Mr. Mitchell retired on January 1, 1985, he received all of his vested pension benefits in a single

lump sum. Although he filed a protest under Mobil's internal procedures, he did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim in his complaint, nor did he seek reinstatement. Instead, he claimed that Mobil's violation of ERISA entitled him to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty. Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to vested benefits, but only a claim for compensatory damages. Furthermore, Mr. Mitchell never sought reinstatement; therefore, he also could not have a reasonable expectation of returning to covered employment. Because Mr. Mitchell failed to prove that he was still a participant in the Plan, it is inescapable that he did not have standing to seek enforcement of his ERISA claims. The trial court's holding that Mr. Mitchell is entitled to recover under ERISA, therefore, must be reversed.

For the foregoing reasons, we REVERSE the judgments of the district court.

APPENDIX B

[MOBIL'S MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF PLAINTIFF'S CASE-IN-CHIEF]

[p. 798] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

vs.

MOBIL OIL CORPORATION, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Trial to Jury: Volume IX)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:40 a.m., on the 9th day of December, 1988, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[p. 834] If the Court please, we move for directed verdict on the portion of the case that is before the jury, the age claim, on the following grounds:

First, the uncontradicted evidence shows that there is no constructive discharge.

THE COURT: Just one moment.

Go ahead.

MR. TAYLOR: The uncontradcited [sic] evidence shows that there is no constructive discharge. The uncontradcited [sic] evidence shows that there is no disparate impact. The uncontradcited [sic] evidence shows that the company had a reasonable business justification, and Plaintiff has failed to advance an alternative that would have accomplished the same result as the business purpose of the company.

Each of those grounds is a separate ground for directed verdict.

[p. 835] THE COURT: Let me just ask you this question, because I've been wondering about it. I can understand the argument for the business necessity of raising the 5 percent to a greater percent, 9, to make the lump sum actuarial equivalent to the annuity; but I don't quite understand what your theory is on what the business necessity was of changing the threshold.

MR. TAYLOR: First of all, your Honor, the standard, as I understand it, is not business necessity but legitimate business reason.

THE COURT: All right.

MR. TAYLOR: I believe that's the term of art.

THE COURT: Okay.

MR. TAYLOR: Okay. The legitimate business reason was that the original intent in 1977, when $250,000 was established, was that that be the threshold. It is not indexed for inflation; and by 1984, it was realized that 250,000 in 1977 had become much less in 1984. So in 1984, they returned to the original intent and also indexed for inflation.

There has been testimony as to the enormous over-utilization. Virtually a hundred percent of anyone who could possibly get his hands on the lump sum was taking it, and the company was very concerned that people were doing this unwisely and to their financial jeopardy. They didn't know how to handle the money, they would use it for current expenses and not retirement.

[p. 836] THE COURT: I can understand an altruistic type of reason, but is there a business reason?

MR. TAYLOR: That is the legitimate business reason, your Honor: concern for the financial security of employees. That is a very legitimate business reason. This is a retirement plan. It is not a savings plan, it is not a defined contribution plan. It is a retirement plan. The basic purpose of it, as stated in it and in ERISA, is to provide financial security for the retired life of the employee.

THE COURT: Okay. Any comment from Plaintiff before I rule?

MR. BARNHART: Unless the Court has any questions about any of the points, we don't think that the defendants' position is well taken. And if you're concerned about any one of the three, we'd be happy to discuss them, your Honor.

THE COURT: Well, at least at this point, it would appear to the Court that there is a facial problem concerning age, as there was in *Thurston*, which means that Defendant should go forward with whatever evidence you wish to have, in that the testimony in its best light for the plaintiff is that people like the plaintiff were put in a

position that either they quit their job or else they lost the opportunity for the more beneficial lump sum payment.

The Court would therefore deny the motion for a directed verdict at this point. We should go forward and hear [p. 837] whatever further evidence Defendant wants to present. I recognize you've presented some with your cross-examination.

MR. TAYLOR: May I just point out in this regard, your Honor, that those numbers that Mr. Miller just went through with Mr. Sunila show that the impact is statistically insignificant. At best, you've got slightly over half of those eligible who chose the lump sum. That means you've got almost half of those over 55 eligible for the lump sum who did not choose it. I suggest that those numbers are statistically insignificant as a matter of law.

THE COURT: Any comment on this?

MR. BARNHART: Well, your Honor, I don't know what the authority is that that would be statistically insufficient on the first hand.

But on the second hand, they still have not overcome the simple fact that the only people who were affected by this change in the program were people over 55 years of age. People under 55 years of age were simply not affected. They had not accrued the right to retire; that is, they had not met the first qualification of being age 55; so therefore, there was on the face of it different impact for those over 55 to those under 55.

And I don't where the defendants -- I don't know how it is that the defendant feels that 50 percent is statistically insufficient. I haven't seen any such case

[p. 838] authority, No. 1. No. 2, I don't even know in the cases that we've seen on impact that we have to prove disparate impact on the basis of statistics.

THE COURT: Well, I don't think statistics enters into this particular case, as it did in some of the other cases that were discussed. I think this is case [sic] much more like *Thurston* than like *Watson*.

But in any case, we've heard that in the first half of '84, 444 retired with the lump sum; whereas in the window period, three times that amount retired with the lump sum, so there was an increase.

MR. TAYLOR: Which was very slightly more --

THE COURT: 300 percent of the number that retired in the first six months.

MR. TAYLOR: But half of those eligible.

MR. PRYOR: That's argument.

MR. BARNHART: Also, your Honor, remember that Mr. Bruce's memo showed that a hundred people retired before the June 13 memo, when they heard the rumors on the leaked memo. So of the 444 they've talked about, 100 of them suddenly announce when the leak came out that they were going to change the retirement plan. So that number is --

MR. TAYLOR: I don't mean to belabor this. The Court has give [sic] me the opportunity. I appreciate it.

THE COURT: I don't think this is a statistical case, [p. 839] and the motion will be denied and we'll go forward.

* * *

APPENDIX C

[MOBIL'S MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF ALL THE EVIDENCE]

[p. 881] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

vs.

MOBIL OIL CORPORATION, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Trial to Jury: Volume X)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 1:50 p.m., on the 9th day of December, 1988, in Courtroom C-204, United States Courthouse, Denver, Colorado.

* * *

[p. 962] OUTSIDE THE PRESENCE OF THE JURY

MR. TAYLOR: May I just renew defendants' motion for directed verdict?

THE COURT: Surely, you may. I will give you a chance to do that.

MR. TAYLOR: I don't -- I simply wish to renew it for the record, for the reasons stated at the close of the plaintiff's case. I do not intend to reargue it.

[p. 963] THE COURT: Fine. After we get all the instructions where at least I am satisfied with them, then we can make a record on them, and as part of that record, I will give you a chance to renew whatever motions or make any motions you want to.

MR. TAYLOR: I was satisfied to do it now and have the Court deny it.

THE COURT: The Court will deny your motion.

MR. TAYLOR: Thank you.

* * *

APPENDIX D

[p. 1079] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

vs.

MOBIL OIL CORPORATION, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Trial: Volume XIII)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 2:15 p.m., on the 3d day of January, 1989, in Courtroom C-506, United States Courthouse, Denver, Colorado.

* * *

RULING

THE COURT: Well, the attorneys have raised many issues; and obviously somebody, if not both sides, are [sic] going to take an appeal to the Tenth Circuit and we're going to have some ultimate decision on some of these issues. And my concern at this point is to make little error, if I can avoid error, and to make the decisions that I think the Tenth Circuit would see as the correct decisions.

Just a moment.

Damages first: I have some real problems about the issue of the 86,000 and whether that's in the nature of back pay and thus on the ADEA damages subject to liquidated damages, or in the nature of front pay, in which case it is not. And in making the decision, it seems to me that I am in doubt and that there certainly is an effective argument that can be made that this is, even though the jury listed it on the verdict in the back pay, nevertheless it's in the nature of front pay damages. [p. 1130] I'm not sure, quite frankly; and I'm not sure how the Tenth Circuit would view it. And since the plaintiff has the burden of proof, the Court will decide this issue favorably for the defendant, and the liquidated damages will be awarded on the amount that is clearly the back pay amount, which is 405,962.76.

By the way, Charlotte, would you run in and get my pocket calculator out of the front door [sic] of my desk? I may need that, not rely on my arithmetic.

The Court also would rule that prejudgment interest will not be allowed where liquidated damages is [sic] given, just as punitive damages are not allowed, and that the liquidated damages on the 405,962.76 foreclose any additional amounts of prejudgment interest.

The Court would also rule while we're talking about the ADEA case and not the ERISA case that the -- that the $86,000 is a proper damage figure. It is not double damages. I understand the argument made by Mr. Barnhart and agree that there would have been greater -- a greater lump sum amount had he stayed on till page [sic] 60 or 61, whatever age he would have been at the end of August, '89, and that therefore there is no double damage

amount by figuring in the 86,000. So that amount will not be stricken. I take it in effect we have a motion to strike.

Now, let's get down to the ERISA issues, because there is [sic] a lot of interesting issues under ERISA; and perhaps we [p. 1131] start with the fact that ERISA is to be liberally construed. And we do have law in the Tenth Circuit which this court intends to follow on ERISA. I suppose if one were to be very nitpicking, one would argue that the Tenth Circuit case somehow is distinguishable, *Eaves v. Penn*. And indeed, some of the facts are a little bit different in *Eaves v. Penn* than in the case at bar. But basically, the rulings and the holdings in that case apply to what this court determines and what the jury determines; and I have to say that I do agree with the jury verdict that there was an age discrimination violation here; that the case basically, if not on all fours, at least lends to the understanding of what the law is in this area.

In *Eaves v. Penn* -- and the cite is 587 F.2d 453, 1978 case, they indicate that under the facts of that case -- and they do say "unique circumstances"; but they don't talk about embezzlement -- the plan trustee in recommending, designing, and implementing an amendment of the profit sharing plan to an employee stock ownership plan acted in a fiduciary capacity under the act.

In reading the briefs and trying to interpret what the law is, I think this case is the primary law that the Court considers -- this court considers in the Tenth Circuit; and I have to agree with the plaintiff that from an analysis of what was done in this case, the actions that were taken in this case were by Mobil acting, wearing the hat of fiduciary and not [p. 1132] wearing the hat of plan designer.

This is not the case of a plan being designed from the very beginning. This is not a case with the changes being made which did not affect any of the administration. This is a case where there were changes which had some very profound effects on the amount in the plan and on the rights of the beneficiaries.

Indeed, this is a case where the plan amount was reduced by the amount of $350 million as part of this change; so we do have a question of reducing the actual equity, benefits of the plan, even if it was reduced by giving it to certain beneficiaries early on, not really according to their desires but according to the company's desires.

This is a case where the evidence showed that by eliminating the number of employees who retired early or who were required to retire in order to get the lump sum benefits that the company did, indeed, save a lot of money by not having to pay as much into the plan in '84 and '85 as they did earlier based on the exhibits that were admitted; and this is a case where there is absolutely no question that there was a change in this plan which the beneficiaries should have known about and which was hidden from them.

The IRS change in allowing the company, allowing the fiduciaries to waive the amount, the lump sum amount in certain cases, the waiver part of the plan, was revealed to these beneficiaries. In the brief, it's talked about as a "secret [p. 1133] amendment"; but it was not told to the employees until a very -- until long after people had decided to retire. And indeed, I think the

inference from the evidence is that these employees were actually misled.

Mr. Mitchell was very interested in whether there could be an exception made in his case and was certainly led to believe that there was no exception possible, when indeed IRS did require that the plan be changed in order to allow a waiver, an exception. This was not told to the employees, to the beneficiaries. In fact, they were told that IRS had approved the plan; and they were not told that what IRS had approved was the plan as changed.

This is, I think, a real problem and was during the trial for the defendants, because it's very difficult for this court -- and apparently it was difficult for the jury – to fathom any good reason why this was hidden from the beneficiaries.

In affecting the lump sum option which the employees had, the right to the lump sum, the right to the lump sum form of benefits, the -- this overlaps a little -- but it would appear that the company, Mobil, was acting in a fiduciary capacity. So for many reasons, for several reasons -- because they were affecting the amounts in the plan, they were changing the plan in such a way that certain highly paid company employees would continue to receive lump sum, whereas lesser employees, lesser paid employees, would not -- they were changing the plan in a way [p. 1134] that would benefit the company, in that smaller amounts would have to be paid into the plan. The plan was amended by the IRS, and this was not revealed to the employees, the beneficiaries. All of these factors lead this court to conclude that the hat that the

defendant was wearing was the hat of the fiduciary and not the hat of the designer.

The Court also would conclude as a matter of law that indeed there was a change in the benefits, and we do have the cases decided before REA which are not decisive. I think the case that I'm convinced is the correct statement of the law is the *Amato v. Western Union* case, 773 F.2d 1462, a 1985 case in the Second Circuit, which is after the amendment.

The problem I have with *Musto* is that it's really talking about oranges and not apples. In the *Musto* case -- and this is a very new case. We don't have a citation on it, or maybe we do. Sixth Circuit case. The Court says the following on page 10 of the decision of the slip opinion: They say, "Under ERISA, as we have seen, the fact that an employee acquires a vested non-terminable right to pension benefits such as those described in Exhibit 21 does not in any way suggest that the employee acquires a comparable vested right to medical insurance benefits under a welfare plan that does not provide for the vesting of such benefits."

There are a couple other places in the opinion where the court distinguishes between the employee who has a vested [p. 1135] non-terminable right Florida pension plan and the difference between this problem that they're discussing, which involves medical benefit -- medical and expense insurance plans.

This court is satisfied that under the statute, 1054(g), there was indeed an accrued benefit: the right of the employees to have their lump sum retirement; and even though that -- even though the plan administrators, even

though the fiduciaries, might be able to correct what they saw as some inequity in the difference between the value of the lump sum and the value of the annuity, they cannot by their actions remove from these employees their valuable right to choose a lump sum, which in effect was what they were doing by changing this plan.

I think the evidence convinced me that there could have been a very easy solution that was suggested in the exhibits: that they could have grandfathered in the lump sum, much as they grandfathered in the percentage change. They chose not to do that. They knew at the time that they made this change that they were going to lose a thousand or more employees who were going to retire early in order to get this optional benefit that they had a right to get as of that point; and they went ahead and made the changes, knowing that they would be taking away from many employees this right to the optional benefit, forcing them to give up their optional benefit or forcing them to retire.

[p. 1136] So I do see a violation of the fiduciary part of the act. I do see a violation of the ERISA act under 1054(g), a violation under 1054(g); and the Court also feels that there is probably an interference with their rights under 1140, although I think primarily the violations of ERISA that this court concludes were committed are under 29 United States Code 1054(g) and under 29 U.S.C. 1104, breach of fiduciary duty.

I have no problem about standing. Mr. Mitchell has standing. I thought that was an issue that no longer existed; but if it isn't, let me clearly conclude that I feel he has standing.

The Court will find that the damages under ERISA for violating the -- this very important statute, which are set forth by 1132, are the damages which square pretty closely with the jury's determination under ADEA, except there is [sic] no liquidated damages. The section indicates that the participant or beneficiary may recover benefits due to him under the terms of the plan, enforce his rights under the terms of the plan, clarify his rights to future benefits under the terms of the plan; and the Court would find that the damages under ERISA equate with the jury's finding of what the total damages are in this case.

There can be, of course, no double damages; and therefore, even though the Court intends to find damages, these damages are the same damages that the jury gave; and he is [p. 1137] entitled to no additional damages, unless I'm missing some point that hasn't been argued.

Let me just make sure my total here is correct. Total damages for violation of ERISA is $588,703.58. Is someone checking my arithmetic? Is that the amount of the jury verdict?

MR. BARNHART: Yes, your honor, according to our figures.

MR. MILLER: Your Honor, could you repeat that figure once more? I'm sorry.

THE COURT: It's the addition of $405,962.76 plus 86,000. My pocket calculator here just died.

MR. MILLER: 86,000.

THE COURT: Plus 96,740.82.

The verdict form doesn't add them up.

MR. MILLER: Is it $86,000 even, your Honor?

THE COURT: That's correct. That's the 20 percent loss. Let's see if we can make this work.

$588,703.58.

In the ADEA -- on the ADEA claim, therefore, the total judgment, if we add in the double -- the liquidated damages on the back pay, would $994,666.34.

On the ERISA claim, the damages -- total damages are $588,703.58, which is a part of the larger figure.

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

v.

MOBIL OIL CORPORATION, a New York corporation, RETIREMENT PLAN OF MOBIL OIL CORPORATION, and the TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,

Defendants.

JUDGMENT
[Entered Jan. 5, 1989]

This matter was tried on December 5, 1988 through December 9, 1988 and continued for trial on December 12, 1988 through December 13, 1988, before a jury of seven duly sworn to try the issues herein, the Honorable Zita L. Weinshienk, Judge, presiding. The jury considered the issues on the age discrimination claim under the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634. Claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, were tried to the Court simultaneously with the jury trial.

The trial proceeded to conclusion and the jury rendered its Verdict on the ADEA case finding back pay damages of $405,962.76, damages reimbursing plaintiff for the 20% reduction in his lump sum benefit in the amount of $86,000.00, and front pay damages of $96,740.82 for a total of $588,703.58. The jury also found

that the actions of the employer were willful. Under 29 U.S.C. § 626(b), liquidated damages will be granted on the plaintiff's award for back pay only, in the amount of $405.962.76 [sic]. Further, the Court will not allow any additional damages for prejudgment interest.

On the ERISA claims, the Court heard the arguments and statements of counsel, considered all the evidence which was presented to the Court and jury, and made certain findings of fact and conclusions of law which are incorporated herein by reference as if fully set forth. The Court finds total damages under the ERISA claim to be $588,703.58, which are the same damages found by the jury under the ADEA claim. Therefore, it is

ORDERED that judgment is entered in favor of plaintiff Porter H. Mitchell and against defendants Mobil Oil Corporation, Retirement Plan of Mobil Oil Corporation, and the Trustees of the Retirement Plan of Mobil Oil Corporation, in the amount of $588,703.58 damages plus liquidated damages in the amount of $405,962.76 for a total judgment of $994.666.34 [sic]. It is

FURTHER ORDERED that post-judgment interest shall accrue at the legal rate of 9.20% per annum. It is

FURTHER ORDERED that plaintiff shall have his costs upon the filing of a Bill of Costs with the Clerk of the Court within ten (10) days of entry of this judgment. It is

FURTHER ORDERED that plaintiff may file a motion for attorneys fees and a request for Rule 11 sanctions by January 17, 1989, and defendants may respond by January 31, 1989. It is

FURTHER ORDERED that the attorneys personally confer before said motion and request are filed. It is

FURTHER ORDERED that defendants may respond to Plaintiff's Motion To Clarify Or Modify Protective Order Entered On September 23, 1987 by January 17, 1989.

DATED at Denver, Colorado, this 4th day of January, 1989.

BY THE COURT:

/s/ Zita L. Weinshienk,
ZITA L. WEINSHIENK, Judge
United States District Court

January 5, 1989

Civil Action No. 86-Z-585

[Certificate of Mailing omitted in printing]

JAMES R. MANSPEAKER, Clerk
By /s/ Charlotte Hoard
Deputy Clerk

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL, Plaintiff – Appellee, Cross-Appellant, v. MOBIL OIL CORPORATION, etc., et al., Defendants – Appellants, Cross-Appellees.	)	Nos. 89-1019 89-1085 89-1031 89-1111

ORDER

Filed April 17, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK and BRORBY, Circuit Judges, and DAUGHERTY*, District Judge.

*The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

This matter comes on for consideration of plaintiff's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing, en banc is denied.

Judge Stephanie K. Seymour and Judge David M. Ebel did not participate.

Entered for the Court

/s/ Robert L. Hoecker, Clerk
ROBERT L. HOECKER, Clerk

[Certificate of Mailing omitted in printing]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL,	)	
	)	
Plaintiff – Appellee, Cross-Appellant,	)	89-1019
	)	89-1031
v.	)	89-1085
	)	89-1111
MOBIL OIL CORPORATION, etc., et al.,	)	
	)	
Defendants – Appellants, Cross-Appellees.	)	
	)	

ORDER

Filed July 5, 1990

Before MOORE and ANDERSON, Circuit Judges.

This matter comes on for consideration of plaintiff's motion to clarify.

Upon consideration whereof, the motion is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

BY: Patrick Fisher
Chief Deputy Clerk

APPENDIX H

[SELECTED JURY INSTRUCTIONS AND SPECIAL VERDICT FORM]

INSTRUCTION NO. 9

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an

uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

INSTRUCTION NO. 13

Plaintiff, Porter H. Mitchell, was 56 years old at the time he retired from Mobil. In order to prove that Mobil violated the law:

A. Mr. Mitchell must first prove all of the following four elements:

1. He must show specific employment practices or policies by Mobil which discriminated against him and other employees on the basis of their age with respect to the terms of their employment or their compensation and benefits; or that grouped or classified employees in a way

which deprived older employees of employment opportunities on the basis of age; or that constructively discharged older employees on the basis of their age.

2. He must show the specific adverse consequence which occurred.

3. He must show that the adverse consequences to him and to the other older workers were caused by Mobil's specific employment practices or policies.

4. He must prove that Mobil's specific employment practices or policies adversely affected people in his age group at a substantially higher rate than they affected those in younger age groups.

If you find that these specific employment practices or policies had such an effect, they are presumed to have a substantial disparate impact on older people. Age must be the determining factor in the impact alleged by Mr. Mitchell. However, Mr. Mitchell's age need not be the only reason for the adverse effect on him.

B. If you find that plaintiff has proved the above four elements by a preponderance of the evidence, then you shall consider whether Mobil has presented evidence of a legitimate, nondiscriminatory, business reason for its specific employment practices or policies.

C. If defendant has presented evidence of a legitimate, nondiscriminatory, business reason for its specific employment practices or policies, then plaintiff must prove that the business justification is only a cover-up or pretext for age discrimination.

Pretext can be established by showing: (1) that the challenged employment practices or policies do not carry

out the business purposes defendants allege they serve; or (2) that there were available other acceptable alternative practices or policies which would have better accomplished the defendants' legitimate, nondiscriminatory, business reason or which would have accomplished it equally well with a lesser discriminatory impact.

The burden of proof by a preponderance of the evidence remains on the plaintiff at all times.

INSTRUCTION NO. 16

If you find that the defendant discriminated against Mr. Mitchell on the basis of age, then you must decide whether defendant's violation was willful. If you find that defendant's violation of the age discrimination law was willful, the Court will award Mr. Mitchell money damages in addition to the back pay that you have awarded.

A violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the Age Discrimination in Employment Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

v.

MOBIL OIL CORPORATION, *et al.*,

Defendants.

SPECIAL VERDICT FORM

We, the jury, unanimously make the following answers to the questions submitted to us:

QUESTION NO. 1: Do you find by a preponderance of the evidence that the retirement plan policies of Mobil resulted in unlawful age discrimination against Mr. Mitchell?

ANSWER NO. 1: Yes X No _

If your answer to Question No. 1 is "No", stop here and sign this Special Verdict Form as indicated below. If your answer to Question No. 1 is "Yes", then answer the following question:

QUESTION NO. 2: Do you find by a preponderance of the evidence that Mr. Mitchell was constructively discharged, as this term is defined in these instructions?

ANSWER NO. 2: Yes X No _

If your answer to Question No. 2 is "No", stop here and sign this Special Verdict Form as indicated below.

If your answer to Question No. 2 is "Yes", then answer each of the following questions:

QUESTION NO. 3: What amount of salary and benefits do you award Mr. Mitchell as *back* pay from January 1, 1985, to the date of this trial?

ANSWER NO. 3: $405,962.76
+ 86,000.
491,962.76
[This figure represents the 20% loss from lump sum settlement.]

QUESTION NO. 4: What amount of salary and benefits do you award Mr. Mitchell as *future* pay from the date of this trial to the date you find he would have normally retired?

ANSWER NO. 4: $96,740.82

QUESTION NO. 5: Do you find from a preponderance of the evidence that Mobil's unlawful discrimination was "willful", as defined in these instructions?

ANSWER NO. 5: Yes X No _

DATED: December 13, 1988

/s/ James R. Van Meter
FOREPERSON

ENTERED ON THE DOCKET
DEC 19 1988
JAMES R. MANSPEAKER
CLERK
BY Illegible

[Bracketed material was handwritten]

(2)

No. 90-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents
Mobil Oil Corporation, et al.

September 17, 1990

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals, applying the proper standard of review, correctly reviewed the evidence and determined that petitioner failed to establish that Mobil's valid business justifications for amending its pension plan were a mere pretext for age discrimination.

2. Whether the court of appeals correctly held that petitioner was not a Mobil Retirement Plan "participant" entitled to sue under § 502(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a), because he received all the retirement benefits he was entitled to when he retired in 1984.

LIST OF PARTIES

Mobil Oil Corporation, *et al.*, adopt the list of parties in petitioner's petition, but note that the Trustees of the Retirement Plan of Mobil Oil Corporation were never served with process.

A list of Mobil Oil Corporation's parent and all non-wholly-owned subsidiaries, required by Sup. Ct. R. 29.1, may be found in the Appendix, beginning at A-5.

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TABLE OF AUTHORITIES

No. 90-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

This case involves a routine pension-plan change and an employee who chose to retire and was replaced by an older worker. In seeking review of the Tenth Circuit's rejection of his Age Discrimination in Employment Act ("ADEA") claim, petitioner disputes only the court of appeals' evaluation of the evidence (or lack thereof) in the trial record. His attempt to recast these factual determinations as legal errors does not warrant this Court's review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

Nor is there any split among the circuits. Sup. Ct. R. 10.1(a). The Tenth Circuit's holding that petitioner was not a "participant" who could sue under the Employee Retirement Income Security Act ("ERISA")—because he had received all of his retirement benefits—(a) is consistent with the decisions of every other court of appeals that has addressed the issue and (b)

correctly applies *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. 948, 957-58 (1989).

The petition should be denied.

JURISDICTION

Mobil accepts petitioner's jurisdictional statement, but notes that, contrary to petitioner's claim [at 1 n.1], the Tenth Circuit did not "refuse to rule on" his request for a new trial on remand. The court denied it. [Appendix to Mitchell petition ("App.") 46.][1]

COUNTERSTATEMENT OF THE CASE

The basic issue in this case is whether an employer may amend its pension plan to take into account eight years of unprecedented inflation. The Tenth Circuit correctly held that Mobil could do so without violating ADEA and that, because petitioner had received all of his retirement benefits, he had no claims under ERISA.

A. Counterstatement of the Facts

The normal form of retirement benefit under Mobil's employer-funded, defined-benefit Retirement Plan (the "Plan") has always been a monthly annuity check for life. Since 1977, however, eligible Mobil employees could receive their benefits in a single lump-sum payment, based on the discounted present value of the monthly annuity payments each employee would expect to receive over his or her lifetime. In 1977, Mobil used a 5% interest-rate assumption to compute the present lump-sum value of an employee's future annuity benefits under the Plan. [App. 3.]

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[1] Petitioner asked for and obtained an extension of time from Justice White to file his petition for certiorari on the ground that he "intend[ed] to present [this] issue" in his petition if (as he correctly predicted) the Tenth Circuit denied his motion. The petition, however, does not raise it.

To be eligible for the lump-sum option, an employee had to have either an accrued lump-sum pension benefit or a net worth (excluding the lump-sum benefit itself) of at least $250,000. [App. 3.] This eligibility threshold was intended to help ensure that someone who gave up the security of a lifetime monthly check and took on the investment risks of a "one-shot" lump-sum payment had enough of a "financial cushion" to bear those risks and withstand any adverse financial consequences. [Tr. 156-57, 286, 290-91, 347, 362-63, 385-86, 873-74; PX 4.]

Between 1977 (when the lump-sum option was put into the Plan) and 1984, interest rates soared from around 5% to over 10%, while the Consumer Price Index ("CPI") rose from 177.1 to over 300. This inflation had two marked effects on Mobil's Retirement Plan.

First, the lump sum appeared more valuable than the monthly annuity—even though they were supposed to be actuarial equivalents—because Mobil still computed the annuity's present value using a 5% interest-rate assumption, while market interest rates had risen to above 9% and 10%. Most employees therefore wanted a lump-sum payment because they thought it was worth more than an annuity.

Second, by 1984, inflation made the $250,000 1977 threshold worth only about $147,500 in constant 1977 dollars. Many more employees could therefore meet the $250,000 threshold using inflated 1984 dollars—even though in real terms they did not have the financial resources the 1977 $250,000 test was designed to ensure.

As the number of employees taking the lump sum increased and threatened to approach 100%, Mobil became concerned that (a) lump-sum withdrawals could strain the Plan's assets and jeopardize all employees' benefits [App. 17; Tr. 234-35; PX 94], and (b) employees who lacked the requisite "financial cushion" (in constant dollars) were abandoning the security of an annuity for the more risky lump-sum payment [Tr. 225-26, 877-78, 898; DX JV at 2].

The obvious solution was to raise the $250,000 threshold and the 5% interest-rate assumption to current levels, in effect

indexing them for inflation and changing economic conditions—as Mobil could have done in 1977, when it adopted the lump-sum option. ($250,000 in 1977 dollars was the equivalent of $450,000 in projected 1985 dollars.)

In early 1984, Mobil therefore (a) raised the lump-sum interest rate from 5% to 9.5% prospectively (*i.e.*, for benefits accrued after 1984), (b) raised the lump-sum eligibility threshold from $250,000 to $450,000, and (c) indexed the new threshold to the CPI. [App. 3-4; PX 8A, PX 10A.] These amendments, which would apply to all Mobil employees retiring on or after February 1, 1985, were announced on July 2, 1984 [PX 46]—to give employees already eligible to retire (*i.e.*, age 55 and over) "at least six months to take advantage of the old eligibility requirements" for the lump sum [PX 8A; App. 17-18].

By providing a six-month notice or "window" period, Mobil gave every retirement-eligible employee a choice: the employee could (a) retire before the new amendments became applicable and receive pension benefits under the "old" Plan, or (b) continue to work and retire later under the amended Plan, like all younger (non-retirement-eligible) employees. [App. 4.] It is the "window" period that lies at the heart of petitioner's complaint, because he alleges that it was used to "force" retirement-eligible employees to elect early retirement.[2]

Petitioner was almost 56 years old in July 1984 and was therefore eligible to retire when Mobil announced the 1984 Plan amendments. With 31 years of service and a 1984 salary of $83,560, he knew he could meet a $450,000 lump-sum threshold if he retired at 60. But he was not 100% sure he would satisfy possible *future* requirements (indexed to the CPI) for a lump sum in lieu of a lifetime annuity if he continued to work. [App. 4; Tr. 566-67, 595, 614-18.]

Mobil did not want petitioner to retire. His supervisors told him that they were pleased with his work and that he would be promoted if he stayed. [App. 7; Tr. 635-37.] But he wanted

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[2] As petitioner himself put it, if Mobil had simply raised the lump-sum threshold without offering a "window" period, "[t]hat wouldn't have forced me out of my job." [Tr. 651.]

"certainty" and "unqualified assurance" that he would be able to receive a lump-sum payment [Tr. 595, 661, 664]—guarantees that Mobil could not give him.[3] He therefore announced on October 1, 1984 that he would retire on January 1, 1985 with a lump-sum pension under the "old" Plan. After he retired, Mobil filled his position with an *older* employee. [Tr. 958.]

Petitioner's lump-sum pension was valued at approximately $471,000 when he retired. The lump sum he actually received was discounted to $385,026.98 because petitioner was paid his benefits—and could earn interest on them—at age 56, rather than at age 60. [*See* Tr. 559 (sum actually paid to petitioner was discounted by approximately $86,000); PX 67.][4] Petitioner also received approximately $250,000 from his Mobil Savings Plan, for a total of roughly $635,000 (not counting stock-ownership plan benefits). These payments represented everything he was entitled to receive under Mobil's benefit plans.

B. Counterstatement of Proceedings

After voluntarily retiring, petitioner filed an age-discrimination charge against Mobil with the Equal Employment Opportunity Commission ("EEOC") in 1985. The EEOC rejected his charge [PX 56], and petitioner then filed suit in the United States District Court for the District of Colorado, alleging violations of ADEA and ERISA stemming from Mobil's 1984 Plan amendments.

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[3] Petitioner's claim [at 4] that Mobil's "[r]aising the threshold would forever disqualify [him]" from obtaining a lump-sum payment is contradicted by the record. Petitioner had a good chance of meeting the new threshold, even with CPI indexing [*see* PX 67, PX 87], but he did not want to take even a small chance that he would not do so.

[4] "Normal" retirement age at Mobil was 65. Mobil's Plan provided for an undiscounted retirement benefit at age 60, and it discounted retirement benefits by 5% per year for any employee who retired before age 60 [App. 3]—because the employee would receive more years' worth of annuity payments (or their lump-sum actuarial equivalent, which could be invested) than would an employee retiring at normal retirement age (65). Social Security works the same way. The granting of unreduced benefits to employees retiring between 60 and 65 might be deemed a "subsidy" [PX 133] not required by actuarial principles.

In December 1988, a jury awarded petitioner $994,666.34 on his ADEA claim. The district court later awarded him $588,703.58 on his ERISA claim (subsumed within the larger ADEA award). [App. 42.]

Mobil appealed, and the Tenth Circuit reversed. It held that (a) petitioner had not established that Mobil amended its Plan as a pretext for discriminating against older employees, and (b) petitioner did not have a cause of action as a "participant" under ERISA because he had received all the benefits Mobil owed him under the Plan and was not seeking any additional benefits.

REASONS FOR DENYING THE WRIT

Petitioner sounds three principal themes under ADEA, none of which has merit or is worthy of certiorari: the Tenth Circuit (i) improperly took the case from the jury, (ii) erroneously reviewed the trial record, and (iii) is "hostil[e] to the purposes of ADEA." The claim of "hostility to ADEA" is a transparent attempt to manufacture a certiorari issue; the other claims relate only to the court of appeals' proper review of the particular facts in the record.

The Tenth Circuit's rejection of petitioner's ERISA arguments follows this Court's teaching and the unanimous view of the other courts of appeals that have ruled on this issue.

I

The Tenth Circuit Correctly Ruled that the District Court Should Have Granted Mobil's Motion for a Directed Verdict on the ADEA Claim.

The Tenth Circuit applied the proper legal standards in reviewing and reversing the district court's denial of Mobil's motion for a directed verdict. Contrary to petitioner's misrepresentations, the record amply supported the Tenth Circuit's conclusion that petitioner had not provided evidence from which a jury could reasonably find that petitioner had been discriminated against or constructively discharged because of his age.

A. The Tenth Circuit Applied the Proper Standard for Reviewing a Denial of a Motion for Directed Verdict.

The Tenth Circuit stated it would "reverse the trial court's denial of [Mobil's] motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party." [App. 16-17.]

This is the correct standard. *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 250-52 (1986); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.02[1], at 50-27 (2d ed. 1990) (collecting cases) ("appellate court must consider the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion").

Petitioner [at 18-19] erroneously relies on *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946), for the proposition that " 'an evidentiary basis for the jury's verdict' " is sufficient to withstand a motion for a directed verdict and that " 'a complete absence of probative facts' " is required for a reversal.

The Tenth Circuit was not obligated to accept *any* amount of evidence—however slight—to support the verdict. As this Court has emphasized, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be *insufficient*; there must be evidence on which the jury could *reasonably* find for the plaintiff." *Anderson* v. *Liberty Lobby*, 477 U.S. at 252 (emphasis added); *accord Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).[5]

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[5] Petitioner ignores that *Lavender* found "sufficient evidence" and a "*reasonable* basis in the record" for submitting the case to the jury and accepting the jury's inferences. 327 U.S. at 652 (emphasis added). But even if *Lavender* (a Federal Employer Liability Act ("FELA") case) could be read as permitting a mere scintilla of evidence to suffice, *Anderson* rejects that standard.

Lavender also does not apply to non-FELA cases. 5A J. Moore & J. Lucas, ¶ 50.02[1], at 50-25. Other than inapposite cases under Fed. R. Civ. P. 52(a) (findings of fact by trial court), all but two of the cases petitioner cites [at 18-19] are FELA cases. The two non-FELA cases—*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962), and *Aetna Life Ins. Co.* v. *Ward*, 140 U.S. 76, 91 (1891)—apply essentially the same standard of review the Tenth Circuit used here.

Because the court of appeals correctly found that there was "*no* evidence to support [petitioner's] inference" that Mobil had amended the Plan and provided a "window" period to force surplus older workers to retire [App. 20 (emphasis added)], petitioner could not have prevailed in any event—even under a "scintilla" test.

B. The Tenth Circuit Properly Followed the Three-Part Analysis for Discrimination Cases.

The Court has established a three-step framework for both disparate-impact and disparate-treatment cases: (a) the plaintiff must present a prima facie case of discrimination; (b) the employer must produce evidence of a "business justification" for its allegedly discriminatory actions; (c) the plaintiff must then prove that those business practices were merely a "pretext" for discrimination. *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2125-26 (1989); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981). The Tenth Circuit properly applied this framework here.

Contrary to petitioner's contention [at 12], *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), has nothing to do with this case. There the Court vacated and remanded because the court of appeals (and the district court) had "evaded the ultimate question of discrimination *vel non*" (the third step) by focusing only on the first step, "whether Aikens made out a prima facie case," even though the case had been "fully tried on the merits . . . ." 460 U.S. at 714.

Here, the Tenth Circuit did reach "the ultimate question of discrimination *vel non*." It (a) reviewed petitioner's prima facie case [App. 9-11], (b) assessed Mobil's business justifications [App. 16-18] and then (c) correctly concluded that Mobil had not adopted its Plan amendments as a pretext for discriminating against older workers [App. 18-20].

As the Court noted in *Aikens*, the three-step inquiry is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

460 U.S. at 715. The Tenth Circuit applied this framework in just that way.[6]

Petitioner's assertion that the Tenth Circuit applied the "wrong" three-part test is also irreconcilable with his acknowledgment [at 12] that the court may proceed directly to the " 'ultimate question of discrimination *vel non*' " and that the analytical framework for considering that issue was " 'never intended to be rigid, mechanized or ritualistic' " (quoting *Aikens*, 460 U.S. at 714-15). Petitioner's attempts [at 9-10] to conjure distinctions between disparate-impact and disparate-treatment cases are therefore meaningless.

In either an impact case or a treatment case, the employer satisfies its "second-step" burden by articulating a business justification for its conduct. *Wards Cove*'s requirement of "a reasoned review of the employer's justification" in an *impact* case was meant to weed out "mere insubstantial justification[s]," 109 S. Ct. at 2126—a consideration equally applicable in a *treatment* case. *Burdine*, 450 U.S. at 255, 258 (treatment case: employer's second-step explanation "must be legally sufficient to justify a judgment for the defendant"; rejecting contention that employer " 'may compose fictitious, but legitimate, reasons for his actions' "); *see also Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion) (impact case: employer need only "produc[e] evidence that its employment practices are based on legitimate business reasons").

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[6] So have many other courts of appeals in fully tried ADEA cases. *E.g.*, *Laurence* v. *Chevron, U.S.A.*, 885 F.2d 280, 283-85 (5th Cir. 1989) (reversing verdict for plaintiff); *Bartek* v. *Urban Redev. Auth.*, 882 F.2d 739, 742-43 (3d Cir. 1989) (affirming verdict for plaintiff); *Carter* v. *City of Miami*, 870 F.2d 578, 581-85 (11th Cir. 1989) (reversing verdict for plaintiff); *Arnold* v. *United States Postal Serv.*, 863 F.2d 994, 1000 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 140 (1989) (reversing judgment for plaintiff); *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 254 (1st Cir. 1986) (affirming directed verdict for defendant); *Holley* v. *Sanyo Mfg.*, 771 F.2d 1161, 1164-68 (8th Cir. 1985) (reversing verdict for plaintiff); *Christensen* v. *Equitable Life Assurance Soc'y*, 767 F.2d 340, 342-44 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (reversing verdict for plaintiff).

Nothing in the Tenth Circuit's decision suggests that the court believed Mobil could satisfy its burden of production merely by articulating an insubstantial business reason. The court's careful consideration of the evidence demonstrates that the Tenth Circuit gave Mobil's business justifications the requisite "reasoned review."

The ultimate issue in the "third step" of both impact and treatment cases is also the same: whether the employer's business practices were merely a "pretext for discrimination." *Wards Cove*, 109 S. Ct. at 2126 (impact); *Burdine*, 450 U.S. at 253 (treatment); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (impact); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973) (treatment); *see also Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982) (an impact case, cited by Tenth Circuit in describing petitioner's burden of proving that Mobil's actions were a pretext for discrimination [App. 16]).

If the employer's proffered justifications are "unworthy of credence," they might be "pretextual." Proof of less onerous but equally effective alternatives also might make the employer's business reasons "unworthy of credence," and therefore "pretextual." The bottom line, however, always is "pretext." The various descriptive phrases mean essentially the same thing and are not substantively different "tests."

The Tenth Circuit's reference to what petitioner calls the " 'unworthy of credence' test," rather than to some other semantic formulation (such as "less onerous alternatives"), therefore does not mean—as petitioner argues [at 9-10]—that the court ignored any evidence of "pretext" that might support the jury verdict.

Petitioner's assertion [at 13-14] that the Tenth Circuit reversed on "fact issues [*i.e.*, pretext] the jury never had to consider in order to find in favor of petitioner" is also incorrect.

The jury was specifically (and, petitioner claims [at i], correctly) instructed to reach the issue of pretext "[i]f defendant has presented evidence of a legitimate, nondiscriminatory, business reason." [App. 49.] It was not told to stop at the second step, without considering pretext, if it did not credit Mobil's

business justifications. The Tenth Circuit therefore followed the same path the jury was told to follow.

Petitioner also argues that the Tenth Circuit reversed because he "had failed to satisfy a mandatory burden of production at the third step . . . , *not* because [the court] concluded . . . that no rational trier of fact could have found that Mobil was motivated by a discriminatory reason." He is again wrong. The Tenth Circuit carefully reviewed the entire record and held that "[t]he inference [of discrimination] which Mr. Mitchell asks us to draw . . . is not a reasonable one . . . ." [App. 20.] Given the absence of any reasonable basis in the record for a finding of pretext, the Tenth Circuit properly ruled that the district court should have granted Mobil's motion for a directed verdict.

C. The Court of Appeals Did Not "Supply" Mobil with a Business Reason.

The record, not the court of appeals, supplied the business justifications for Mobil's decision to amend the Plan. Mobil presented evidence of several reasons for the threshold change—including its concern that (a) lump-sum withdrawals could strain the Plan's assets and jeopardize employees' benefits [App. 17; Tr. 234-35; PX 94] and (b) employees who lacked the requisite "financial cushion" were assuming the investment risk of a lump-sum payment and might be left with inadequate resources during their retirement years [Tr. 225-26, 877-78, 898; DX JV at 2].

The Tenth Circuit recognized the mathematically demonstrable proposition that the Plan amendments, by increasing the threshold and linking it to the CPI, "would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation." [App. 17.] Restoration and protection of an important feature of Mobil's Plan design is itself a legitimate business reason.

The Tenth Circuit expressly stated that "over-utilization" of the lump sum and the attendant risk of drain of Plan assets provided a legitimate business reason for the threshold change, and the court cited fairness to employees as a legitimate business reason for the "window" period.

By the same token, petitioner's claim [at 21-22] that Mobil "abandoned" its drain-on-the-Plan rationale misrepresents the record.

Petitioner has tried to alter the record to assert that a Mobil witness denied that "the rationale for this threshold [change] was really the amount of money coming out of the plan" [at 22]. The question actually posed to the witness did not include the word "[change]." [Tr. 290.] Petitioner's lawyers have now added that word in an attempt to transform a question about "the rationale for the threshold" into a very different one asking about the rationale for *changing* the threshold. As the Mobil witness answered, "the rationale for the threshold was the very pronounced philosophy and belief of our Executive Committee that the normal form of pension should be annuity form." [Tr. 290-91.]

The witness' acknowledgment that the Plan was overfunded in 1984 does not obviate Mobil's legitimate long-range concern that continuing increases in lump-sum withdrawals and changes in investment performance (interest-rate shifts, stock-market volatility, and the like) could threaten the Plan's financial security in *future* years, "and actuaries can't make those kinds of predictions." [Tr. 234-35; App. 17.]

Petitioner's assertion that Mobil's counsel "abandoned" the "Plan-drain" justification in his oral motion for a directed verdict is disingenuous. Counsel's argument that Mobil had demonstrated a reasonable business justification for amending the Plan and that petitioner had failed to prove the existence of an equally effective alternative encompassed all the evidence in the record, including that dealing with the potential drain on the Plan. The fact that counsel highlighted only the most fundamental reasons (restoring the Plan's basic design and retaining the annuity as the normal form of retirement benefit) in the very brief exchange with the court on this point does not mean that Mobil abandoned the other closely related reasons for its legitimate business decision to change the threshold.[7]

[7] Counsel's statements responded to the district court's question about the "business necessity . . . of changing the threshold." [App. 26.] Because

D. The Court of Appeals Correctly Found No Evidence of Pretext.

Chronology of the Plan Amendments. Petitioner concedes [at 23] that "Mobil began consideration of the plan amendments, with the retirement window, no later than January 1984." But he does not inform the Court that Mobil began its consideration of changing the threshold in September *1983* [App. 18] and that, on January 9, 1984, Mobil's Executive Committee "directed" that any change in the lump-sum threshold must have "a reasonable transition period in which employees could take advantage of the existing threshold requirement for lump-sum settlements between the announcement of any increase in that threshold amount and its effective date" [PX 7A at 2; App. 18-19].

As the court of appeals held [App. 19-20], the record is therefore clear that Mobil decided on the "window" period—the prerequisite for the alleged constructive discharge—no later than January 9, 1984. This was *before* the Executive Committee ever discussed the possible Superior Oil Company merger on February 2 [App. 19-20; PX 177]; *before* the Committee "agreed" on February 9 to raise the threshold to $450,000 [PX 8A; App. 19];[8] *before* the Mobil-Superior merger agreement was signed on March 11 [Tr. 959]; and *before* any projections of possible "window period" retirees were generated [PX 229 (February 28), PX 230 (April 13), PX 114 (April 17)].

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the court asked only about Mobil's reason for "changing the threshold," counsel had no occasion to mention what petitioner [at 17] calls the "fairness" rationale (giving employees a chance to retire under the terms of the "old" Plan). "Fairness" explains why Mobil offered a "window" period [App. 17-18], not why it "chang[ed] the threshold."

[8] Petitioner argues [at 24] that Mobil's Executive Committee did not "adopt" the Plan amendments on February 9. The minutes of the meeting state that the Committee "agreed to" the amendments on that date. [PX 8A.] On June 13, 1984, the Committee "adopted the following amendments . . . as previously approved on February 9, 1984." [PX 10A at 2.] The difference—if any—between "agreed to" and "adopted" is immaterial, because (a) the "window" period had already been established by January 9 [App. 18-19] and (b) the decision to amend the Plan was made on February 9 [App. 19].

This uncontroverted chronology of events undergirds the Tenth Circuit's correct conclusion that "the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan." [App. 20.][9]

"Ignored" Evidence. The other evidence petitioner says the Tenth Circuit "ignored" [at 24-25] is illusory.

• There is no evidence that "a program of 'organizational streamlining' had 'been underway since 1981.' " This patchwork quotation [at 24] refers to a March *1986* interview with Mobil's chairman, who said "our drive toward efficiency has been under way since 1981. We're selling the assets that don't meet our test of leadership." [PX 59 at 3.] Later, in responding to a question about "[c]areer development," he observed that "organizational streamlining has reduced the total number of jobs available to promote people into." [*Id.*]

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[9] The Tenth Circuit could have reversed for at least two other reasons—each of which would be an alternative ground for affirming the court of appeals' judgment.

First, there was no age discrimination or constructive discharge as a matter of law. *All* Mobil employees, regardless of age, lost the "right" to a lump-sum pension under the $250,000 threshold; older employees therefore were no "worse off" than younger ones, even if *all* were for some reason thought to be "worse off" than they had been before the amendments. *E.g.*, *Schuler* v. *Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988); *Bodnar* v. *Synpol, Inc.*, 843 F.2d 190 (5th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Henn* v. *National Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987); *Christopher* v. *Mobil Oil Corp.*, No. B-89-0653-CA (E.D. Tex. June 22, 1990), *appeal docketed*, No. 90-4562 (5th Cir. July 18, 1990) [at A-1] (summary judgment for Mobil on ADEA claims brought by former employees who—after petitioner prevailed against Mobil in the district court—claimed that they too had been "forced" to retire because of Mobil's 1984 Plan amendments).

Second, ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), permits the use of age-based criteria for determining fringe benefits such as pensions. *See Public Employees Retirement Sys.* v. *Betts*, 109 S. Ct. 2854 (1989), which the Tenth Circuit declined to apply in this case [App. 13-15].

• The transcript says only that "by '81, weren't—wasn't the oil industry in general, and Mobil in particular, beginning to tighten up financially in anticipation of tougher times?" "Yes, that's correct." [Tr. 160.]

• Petitioner's reference [at 25] to "a long standing 'company policy' designed 'to encourage employees to leave' " relates to a common provision in Mobil's Plan allowing employees to retire at age 60 with unreduced retirement benefits even though normal retirement age under the Plan is 65. [PX 133.] This policy has nothing to do with the Plan amendments at issue here.

Less Onerous Alternatives. Contrary to his assertion [at 10], petitioner did not demonstrate the existence of equally effective alternatives with less adverse impact on older employees. "Grandfathering" the $250,000 threshold—or eliminating it entirely—as an alternative to the "window" period would not have prevented a potential drain on the Plan because it would not have reduced the rate of lump-sum withdrawals. It would also have defeated the other important purposes of the 1984 amendments: to restore the 1977 eligibility requirements (in constant dollars) [App. 17] and to make lump-sum distributions available only to retirees with sufficient financial assets to withstand the risks involved [Tr. 319-21, 906-07]. Petitioner therefore did not meet his burden of showing alternatives that were equally effective as Mobil's chosen business practices in achieving Mobil's legitimate goals. *Wards Cove,* 109 S. Ct. at 2126-27.

Mobil's business reasons were valid, and petitioner's evidence failed to raise a jury issue. This is not a matter for certiorari.

E. The Tenth Circuit Is Not "Hostile" to ADEA Claims and Needs No "Supervision."

Petitioner's intemperate attacks on the court of appeals for its alleged "hostility to the purposes of the ADEA" [at 8] are

baseless.[10] The Tenth Circuit has repeatedly sustained ADEA claims after trial.[11]

The Tenth Circuit's reversal in this case is hardly unique; other courts of appeals have frequently reversed rulings for ADEA plaintiffs because of insufficient evidence of age discrimination.[12]

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[10] According to petitioner, the Tenth Circuit also "grossly overstepped the bounds of its reviewing authority" [at 9] and "plainly misapprehends, or refuses to follow, this Court's direction" [at 17]; "petitioner and his counsel were amazed by the opinion of the court of appeals" [at 17]; the court's "gross disregard of the record resulted from a hostility to ADEA" [at 18]; "[t]he Tenth Circuit rummaged through the factual record in this case in startling and extraordinary disregard of [the law]" [at 20]; and it committed other "glaring errors" [at 26].

[11] *E.g.*, *Spulak* v. *K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990) (affirming verdict); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631 (10th Cir. 1988) (affirming liability); *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988) (affirming liability); *Bruno* v. *Western Elec. Co.*, 829 F.2d 957 (10th Cir. 1987) (affirming verdict); *Furr* v. *AT&T Technologies*, 824 F.2d 1537 (10th Cir. 1987) (affirming verdict); *Smith* v. *Consolidated Mut. Water Co.*, 787 F.2d 1441 (10th Cir. 1986) (affirming liability); *Cockrell* v. *Boise Cascade Corp.*, 781 F.2d 173 (10th Cir. 1986) (reversing directed verdict for defendant); *EEOC* v. *University of Okla.*, 774 F.2d 999 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (reversing judgment n.o.v. for defendant); *EEOC* v. *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985) (affirming verdict).

[12] *See* n.6, above; *accord Smith* v. *Goodyear Tire & Rubber Co.*, 895 F.2d 467 (8th Cir. 1990); *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960 (6th Cir. 1989); *Bristow* v. *Daily Press*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

II

The ERISA "Participant" Holding Follows a Uniform Line of Decisions of this Court and the Courts of Appeals.

The Tenth Circuit correctly held that petitioner did not have a cause of action as a "participant" under ERISA § 502(a), 29 U.S.C. § 1132(a). [App. 21-24.][13]

ERISA defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). This Court recently held that "[a] former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits . . . simply does not fit within [§ 3(7)'s] phrase 'may become eligible [to receive a benefit].'" *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. at 958 (adopting the Ninth Circuit's definition in *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

The Tenth Circuit correctly applied *Firestone*: petitioner (a) never sought to return to covered employment; (b) did not have "a colorable claim to vested *benefits*" (because he had received all of his benefits in a lump sum when he retired at the end of 1984); and (c) wanted only damages—back pay, front pay and fringe benefits for years he never worked—not "benefits" under the Plan.[14]

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[13] Petitioner suggests [at 28] that he should have ERISA standing because the district court held his common-law claims preempted by ERISA. He never cross-appealed those claims and cannot raise them here. In any event, he is wrong. *E.g.*, *Lee* v. *E.I. duPont de Nemours & Co.*, 894 F.2d 755, 756-57 (5th Cir. 1990); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *cf. Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 10-11 & n.16 (1957) (NLRA case).

[14] *Accord Kuntz*, 785 F.2d at 1411 ("if successful, [lump-sum retiree's] claim would result in a damage award, not an increase of vested benefits," and "a damage claim is not a plan benefit"); *Freeman* v. *Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654, 655-56 (9th Cir. 1983); *see also Sommers Drug Stores Co. Employee*

Nor is there a "split among the circuits." The other courts of appeals that have considered this issue have all agreed with the Tenth Circuit: a former employee who has received a lump-sum payment of every cent of his pension benefits is not a "participant" and may not sue under ERISA. *Berger* v. *Edgewater Steel*, Nos. 89-3465, -3501, -3570, -3596 (3d Cir. Aug. 15, 1990) (available on Lexis); *Clark* v. *Superior Court*, 905 F.2d 389, 389 (D.C. Cir. 1990) (per curiam); *Kuntz* v. *Reese*, 785 F.2d at 1411; *Yancy* v. *American Petrofina*, 768 F.2d 707, 708-09 (5th Cir. 1985) (per curiam); *Joseph* v. *New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *Gilquist* v. *Becklin*, 675 F. Supp. 1168, 1171 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988); *see also Teagardener* v. *Republic-Franklin Pension Plan*, No. 89-3865 (6th Cir. Aug. 6, 1990) (available on Lexis).[15]

Petitioner's assertion [at 27, 28] that he asked for reinstatement is specious:

• Petitioner's "internal appeals" requested only termination pay and additional benefits calculated as if he had worked to age 60. [PX 60A, DX EQ, PX 60, DX GB, DX GF, DX GH, DX GL, PX 88, PX 89, DX GX, DX HD; App. 24.]

• Petitioner's complaint and amended complaint requested only "retirement benefits" and "lost wages" on his ERISA

Profit Sharing Trust v. *Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989) (ERISA "benefit" is "an ascertainable amount" that allegedly "was owed [to plaintiffs] and should have been paid to them at the time they received their lump sum settlement").

[15] A Department of Labor regulation makes the point clear: "[a]n individual is not a participant covered under an employee pension plan . . . if . . . [t]he individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan." 29 C.F.R. § 2510.3-3(d)(2)(ii)(B). Because it is one of the agencies charged with enforcing ERISA, the Department's views are entitled to special deference. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984).

Although the Tenth Circuit expressly followed the Fifth Circuit's decisions in *Yancy* and *Joseph* [App. 23], petitioner's recitation of an alleged "conflict among the circuits" does not mention either case.

claims. The parties' agreement to an award of front pay instead of reinstatement therefore applied only to the *ADEA* claim (which is the only place the complaints mentioned reinstatement).

• Petitioner's reference to the pretrial order (which is not in the record on appeal) is makeweight. The amended complaint, filed ten months *after* the pretrial order and only two months before trial, makes it clear that petitioner purportedly wanted reinstatement only on his ADEA claim and not under ERISA.

Even if petitioner had wanted to return to work and had asked for "reinstatement," he still would not have been able to sue as an ERISA "participant." The term covers a person who "may become eligible to receive a benefit," ERISA § 3(7), and therefore may include a former employee with " 'a reasonable expectation of returning to covered employment.' " *Firestone*, 109 S. Ct. at 958.

But this part of the definition applies only to someone who (a) has not yet fulfilled his or her *eligibility requirements* for benefits and (b) "has a colorable claim that ... *eligibility requirements* will be fulfilled in the future" if he or she is reinstated. *Firestone*, 109 S. Ct. at 958 (emphasis added); *see also id.* at 958-59 (Scalia, J., concurring) ("the phrase 'may become eligible' has nothing to do with the probabilities of winning a suit").

Petitioner fulfilled the Plan's eligibility requirements years ago. When he retired, he received every penny of his fully vested pension. He cannot now claim to be a "participant" merely by asking for judicial reinstatement to earn increases in the benefits for which he was already eligible.[16]

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[16] *Christopher* v. *Mobil Oil Corp.* [at A-3] also held that former Mobil employees who—like petitioner—claimed they had been "forced" to retire because of Mobil's 1984 Plan amendments were not ERISA "participants," notwithstanding their belated claim that they wanted to be reinstated.

There is no circuit split on this issue.

• *None* of the "conflicting" cases petitioner cites even discusses ERISA's definition of "participant."

• Most of them involved plaintiffs who—unlike petitioner—were prevented from fulfilling *eligibility requirements* to attain vested benefits. *McLendon* v. *Continental Can Co.*, No. 89-5596 (3d Cir. July 26, 1990) (available on Lexis) (scheme to terminate plaintiffs before they attained eligibility for layoff benefits); *Zipf* v. *American Tel. & Tel. Co.*, 799 F.2d 889, 890 (3d Cir. 1986) (termination prevented plaintiff from attaining right to medical benefits after eight days' absence); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1239 (7th Cir. 1983) (termination prevented plaintiff from attaining right to vested "service pension" after two more years of work); *Bradley* v. *Capital Eng'g & Mfg.*, 678 F. Supp. 1330, 1332 (N.D. Ill. 1988) (termination prevented plaintiff from becoming eligible for medical coverage for pre-existing conditions); *Boesl* v. *Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1506 (N.D. Ill. 1986) (defendants' conduct may have prevented decedent from becoming eligible for medical benefits, although plaintiff claimed benefits were due under plan).[17]

• The plaintiff in the only other case petitioner cites, *Warren* v. *Society Nat'l Bank*, 905 F.2d 975, 982 (6th Cir. 1990), was not seeking "compensatory damages" but "a *benefit* to which he was entitled under the plans" (emphasis added).[18]

• Petitioner's argument [at 28-29] focuses on cases involving violations of ERISA § 510, 29 U.S.C. § 1140. But the district court did not find a § 510 violation. [App. 38.]

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[17] Similarly, in *Berger* v. *Edgewater Steel*, the plaintiffs allegedly were prevented from fulfilling eligibility requirements for early-retirement benefits.

[18] *Teagardener* v. *Republic-Franklin Pension Plan*, cited above, is the Sixth Circuit's most recent opinion in this area and—unlike *Warren*—expressly addresses ERISA's definition of "participant."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 17, 1990

APPENDICES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GERALD W. CHRISTOPHER, *et al.*, *Plaintiffs,*	§	
v.	§	Civ. No. B-89-0653-CA
MOBIL OIL CORPORATION, *et al.*, *Defendants.*	§	

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plaintiffs did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd day of June, 19[90].

/s/ RICHARD A. SCHELL
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GERALD W. CHRISTOPHER, *et al.*, *Plaintiffs,*	§	
v.	§	Civ. No. B-89-0653-CA
MOBIL OIL CORPORATION, *et al.*, *Defendants.*	§	

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd day of June, 19[90].

/s/ RICHARD A. SCHELL
United States District Judge

**Listing Pursuant to Sup. Ct. R. 29.1
of Parent and Non-Wholly-Owned
Subsidiaries of Mobil Oil Corporation**

MOBIL CORPORATION (parent)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALPHA-ALET VE DAYANIKLI TUKETIM MAMULLERI PAZARLAMA A.S.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN AMERICAN OIL COMPANY
ARABIAN CHEMICAL TERMINALS
ARABIAN ENERGY COMPANY LIMITED
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN PETROLEUM SUPPLY CO. S.A.
ARABIAN SHIPPING & TRADING CO. S.A.
ARABIAN TRADING CO. S.A.
ARAL A.G.
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO. LIMITED
AUTOBAHN-BETRIEBE GMBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.

BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
BUFFALO RIVER IMPROVEMENT CORPORATION
BUTEY SARL
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY INC.
CANYON REEF CARRIERS INC.
CARBURANTI, LUBRIFICANTI E AFFINI MERIDIONALI-CLEAM S.P.A.
CARBURANTS JEAN COTE COLISSON
CARPI GAS S.R.L.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CEED DESIO S.R.L.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
COBAR PTY. LIMITED
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMBUSTIBLES COLMERAUER
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE IMMOBILIERE (COMIMMO)
COMPAGNIE REGIONALE DE DISTRIBUTION DE PRODUITS PETROLIERS (CO.RE.DIS)

COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
COMPANIA MEXICANA DE ESPECIALIDADES INDUSTRIALES, S.A. DE C.V.
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
CORCOP
CRC LYON CHAUFFAGE
CRCP
CYPRUS PETROLEUM REFINERY LIMITED
DEBA S.R.L. INDUSTRIA PETROLIFERA
DEPOSITI GENOVESI S.P.A.
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DICOMI S.R.L.
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENERGAS S.P.A.
ENERGIE ALPES
ENERGIE NORD DISTRIBUTION
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE ALEXANDRE VIDAL
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GMBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
ETABLISSEMENTS STARCK & CIE
ETS. LATHUILLERE
EUROPETROL S.P.A.

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FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIAMMA LAZIALE S.P.A.
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FIOUL ASSISTANCE SERVICE
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
GUZZARDI PETROLEUM (GIPPSLAND) PTY. LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT _
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTO PLANE SERVICES-I.P.S.-S.R.L.
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ISIDE S.P.A.
ISTANBUL PETROL VE MAKINA YAGLARI LTD. STI.
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
JET AVIATION SAUDI ARABIA COMPANY LIMITED

K.K. NIPPATSU
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K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
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KLAUS KOEHN GMBH & CO. MINERALOEL KG
KUEBLER HEIZOL A.G.
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KURT AMMENN GMBH & CO. KG
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KYGNUS KOSAN KABUSHIKI KAISHA
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KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LES NOUVEAUX COMPTOIRS PETROLIERS
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
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LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MARS-MILAN AIRPORT REFUELLING SERVICE S.R.L.
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERITRANS S.P.A.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GMBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.

MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA LIMITED
MOBIL OIL PORTUGUESA S.A.
MOBIL OIL SIERRA LEONE LIMITED
MOBIL POLYMERS INTERNATIONAL SARL
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
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N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND REFINING COMPANY LIMITED
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
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NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GMBH
NORVAC PTY. LIMITED
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OLDENBURGISCHE ERDOEL GMBH
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P.T. BERAU COAL
P.T. STANVAC INDONESIA
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PERRETTI PETROLI S.P.A.
PETROCAB
PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROL FUEL S.P.A.
PETROL TEAM S.P.A.
PETROLEUM REFINERIES (AUSTRALIA) PTY. LIMITED
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PLEGADIZOS PARA LA INDUSTRIA S.A.
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PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
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RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GMBH
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RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERONAVES LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI CAN COMPANY LTD.
SAUDI CHEMICAL INDUSTRIES COMPANY LTD.
SAUDI MARITIME COMPANY LTD.
SAUDI TANKERS LIMITED
SAUDI YANBU PETROCHEMICAL CO.
SCHUBERT KOMMANDITGESELLSCHAFT
SEGHER DE MEXICO, S.A. DE C.V.
SEIBU KYGNUS SEKIYU HAMBAI K.K.
SENERCO
SERAM S.P.A.
SERENI ET COMPAGNIE

SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SOCIETA ITALIANA PER L'OLEODOTTO TRANSALPINO-SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
SOCIETE BRETONNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE CAMEROUNAISE-EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURANTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
SOCIETE DJIBOUTIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE
SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE MEDITERRANEENNE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE

SOCIETE NORMANDE DE COMBUSTIBLES ET LUBRIFIANTS-NICOL
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE REGIONALE DE PRODUITS ENERGETIQUES
SOCIETE REGIONALE DE PRODUITS PETROLIERS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE ZAIROISE D'EMBALLAGE
SOLAR S.R.L.
SOMODIP
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY LIMITED
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG A.G.
TECKLENBURG GMBH
TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TGF TANKDIENST-GESELLSCHAFT FRANKFURT
THAILAND SOLVENT PRODUCTS LIMITED
THUMS LONG BEACH COMPANY
TOHKO PLASTICS COMPANY LIMITED
TOHPREN CO. LTD.
TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN PROPERTIES INC.
TONEN SEKIYUKAGAKU KABUSHIKI KAISHA
TONEN SOGO SERVICE CO. LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE INC.
TONEN TANKER KABUSHIKI KAISHA

TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY LIMITED
TOYOSHINA FILM COMPANY LIMITED
TRADEWIND MARITIME CO. S.A.
TRANS-ARABIAN PIPE LINE COMPANY
TRANSALPINE OELLEITUNG IN OESTERREICH GMBH
TRESKOME PTY. LIMITED
TRYICE PTY. LIMITED
TURKISH PETROLEUM COMPANY LIMITED
TWIFO OIL PALM PLANTATION LIMITED
UBAG UNTERFLUR-BETANKUNGSANLAGE A.G.
UNITED KINGDOM OIL PIPELINES LIMITED
VALODIA
W.A.G. PIPELINE PTY. LIMITED
WAITOMO/BRENAN PETROLEUM LIMITED W/BP
WAKO JUSHI KABUSHIKI KAISHA
WAKO KASEI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED
WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
YPERSE OLIEFABRIEK JOS DEWULF HENRI N.V.
ZAIRE MOBIL OIL
ZAIRE S.E.P.

(3)

No. 90-297

In The

Supreme Court of the United States

October Term, 1990

PORTER H. MITCHELL,

Petitioner,

vs.

MOBIL OIL CORPORATION, et al.
a New York Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Mobil's varnished description of the case bears little resemblance to the case actually tried in the district court, reviewed by the court of appeals, and now before this Court. Contrary to the first sentence in Mobil's Brief, a pension-plan change that a properly instructed jury and the court of appeals found had resulted in the constructive discharge of more than 1,000 older workers cannot fairly be characterized as "routine." Mobil's statement that Mitchell "chose to retire" flies in the face of the jury's verdict, the district court's findings of fact, and the Tenth Circuit's conclusion that Mitchell and others were constructively discharged because of their age. App. 9. And the fact that one of the discharged employees was replaced by an older worker is irrelevant to a case not based on animus directed specifically to Mitchell by his immediate supervisors but rather based on corporate-wide discrimination against a large class of workers aged 55 and older.

It is not Petitioner's position that an employer may never amend its pension plan to adjust for inflation. Petitioner does contend, however, that an employer violates both ADEA and ERISA when it makes plan changes via a method which it knows will result in the forced retirement of more than 1,000 older workers and knows of alternative methods for adjusting for inflation.

Nor did the court find that Petitioner presented no evidence of age discrimination. Brief at 6. Rather, it found "disingenuous" Mobil's contention that the 6-month retirement "window" was an "extra benefit" not available to younger workers (App. 7) and held that Mobil's plan manipulations were "exactly the type" which this Court did not intend to insulate in *Betts*.[1]

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[1] *Public Employees Retirement Sys. of Ohio v. Betts*, 490 U.S. ___, 109 S.Ct. 2854 (1989).

The court's ultimate conclusion that a directed verdict on the age claim should have been entered was based *solely* upon its mistaken belief that Mobil offered business reasons which were not shown to be pretextual by Mitchell, not on any conclusion that Mobil's plan changes did not constitute constructive discharge because of age.

Mobil's opposition brief deflects and avoids the central issues in this petition. Remarkably, it defends the opinion below as if it were the product of a bench trial in the court of appeals. It points to bits of evidence to support the opinion as if the circuit were the fact finder, not a reviewing court, and ignores the evidence underpinning the jury's verdict. If this case had been tried as a bench trial to the Tenth Circuit and this proceeding were a direct appeal, then Mobil's brief might make some sense. That, however, is not the case.

In terms of legal error, the court of appeals refused to apply disparate impact analysis to what was admittedly an impact case and analyzed evidence of disparate treatment in a linear fashion previously condemned by this Court.

JURISDICTION

Petitioner could not disagree more strongly with Respondent's statement that the court denied Petitioner a new trial. Since the opinion did not expressly state (App. 24) what relief (new trial or judgment) will be afforded Mobil on remand, Petitioner asked the court to "clarify" its intent by specifying that a new trial be ordered since Mobil did not move for judgment n.o.v. In denying the motion for clarification without explanation, the Tenth Circuit did not refuse to order a new trial but simply refused to specify the contents of its mandate in advance. The issue is thus not ripe for consideration by this Court.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals Failed To Apply An Impact Analysis To This Impact Case As Required By *Wards Cove*, Other Decisions Of This Court, And By Instruction No. 13 Which Governed The Case.

Despite the fact that this case was tried and the jury instructed on a disparate impact theory, the Tenth Circuit failed to apply an impact analysis. The opinion does not even mention *Wards Cove*,[2] nor does it address the tests of pretext set forth in Instruction No. 13 (App. 49-50) (whether the challenged changes furthered the reasons alleged or whether less onerous alternatives were available) pursuant to which the jury evaluated the evidence. Without citing the cases by name, the court applied a *McDonnell/Burdine*[3] disparate treatment analysis, and in so doing, viewed the "pretext" issue only on the indirect "unworthy of credence" basis, and further compounded its error by concluding that Mitchell's only offer of pretext was the Superior Oil merger.

In Section B of its brief, Mobil deals with this fundamental flaw by a tautology. "Less onerous alternatives," Mobil suggests, is merely another way of saying "pretext." Since pretext also means "unworthy of belief," the court necessarily analyzed the "less onerous alternative" standard. Further, the Superior Oil evidence could relate only to an "unworthy of belief" indirect method of proving pretext and can have no bearing on the impact tests of pretext set forth in Instruction No. 13.

The Tenth Circuit looked to the wrong evidence and failed to analyze pretext as required in an impact case. As

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[2] *Wards Cove Packing Co. v. Atonio*, 490 U.S. ___, 109 S.Ct. 2115 (1989).

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

shown below, when the correct evidence is viewed in light of the correct tests, it was well within the jury's province to find age discrimination by rejecting Mobil's reasons or finding them pretextual.

1. When The Reasons Articulated By Mobil Are Examined In Relation To The Challenged Practices, The Changes Do Not Carry Out The Alleged Purposes.

a. The Plan Changes. The lump sum strategy consisted of three plan changes: (1) the interest rate was raised from 5 to 9.5%; (2) the threshold was raised from $250,000 to $450,000; and (3) a 6-month "window" which required employees with more than $250,000 but less than $450,000 in net worth or plan benefits to elect premature retirement to preserve the lump sum or to remain employed but forfeiting that benefit.

b. Mobil's "Justifications." The *only* justification offered by Mobil in its motion for directed verdict was the "improvident investor" theory. App. 25-31. The Tenth Circuit failed altogether to address this "justification."[4] Had it done so, however, it would have

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[4] This was, however, the *only* reason it could legitimately address. Fed. R. Civ. P. 50(a) provides that a motion for directed verdict *"shall state the specific grounds therefor."* (Emphasis added). Motions for direct verdict cannot be granted on grounds not stated therein. *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1, 3 (1st Cir. 1977). 9 Wright & Miller, Federal Practice and Procedure: Civil § 2536 at 595, § 2533 n. 83 (1971). Mobil's suggestion (Brief at n.7) that its counsel had "no occasion" to set forth all its grounds for a directed verdict is simply untrue. The trial court in no way prevented counsel from making a record (App. 25-29), nor did counsel attempt to rectify any perceived deficiency in Mobil's record at the close of all the evidence. App. 30-31. The Tenth Circuit's power to analyze the sufficiency of the evidence was restricted to the ground stated in Mobil's motion for directed verdict – the "improvident investor" theory -- a ground it totally ignored.

necessarily sustained the jury's rejection of this reason, assuming it could be considered a business justification (App. 27). Mobil's own witnesses testified that the changes not only did *not* carry out this so-called business purpose, they directly derogated from it. See Adams' Testimony, Pet. at 23; R. Vol. X at 935-38. For example, rather than preventing employees from retiring with less than $250,000 in 1977 dollars, the changes, by Mobil's own predictions, caused exactly that to happen for more than 1,000 employees.

Moreover, the Tenth Circuit relied on two alleged business reasons ("plan drain" and "fairness") never asserted by Mobil in its motion. Both are clearly pretextual when measured by the impact standards of Instruction No. 13. The changes did not prevent the "plan drain," but to the contrary, caused (as Mobil knew would happen) more than 1,000 persons to withdraw some $350,000,000 from the plan in 1984 alone. More assets would be depleted sooner than under any other available alternative. The jury was well within its province in rejecting this reason.

Nor can the "window" be considered "fair." As Mitchell argued and the Tenth Circuit recognized (App. 7-8), the window did not (as Mobil "disingenuously" argued) give the employees an "extra benefit," but "created" the "choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan." App. 7. For all its superficial appeal, the "window" was, in fact, the very engine which drove the discriminatory scheme. How can the very device which caused the "constructive discharge" of Petitioner and more than 1,000 employees be looked upon as "fair"? The jury certainly could find it unfair.

2. The Court Ignored Evidence Of Less Onerous Plan Change Alternatives.

The Tenth Circuit does not mention the "acceptable alternative practice" measure of pretext contained in Instruction No. 13 and overlooked the wealth of evidence of available alternatives with less discriminatory impact.

First, as the trial court found (App. 38), Mobil could have grandfathered the lower threshold.

Second, as Adams testified, raising the interest rate alone would have lessened the demand for lump sum retirements.

Third, elimination of the threshold altogether, as most of Mobil's competitors had done and as Mobil was required by law to do within months of the employee exodus, would have prevented forced retirements altogether.

Fourth, Mobil could have made the IRS-mandated waiver provision known and available to the employees. As a condition of continued favorable tax treatment, the IRS required Mobil to include a waiver provision in the plan to allow employees to seek relief from the new $450,000 threshold. R. Vol. X at 925-26. Mobil did so but withheld this fact from its work force during the window period -- the only time it could have made a difference -- and waited many months after the mass exodus to divulge the waiver's existence. As the trial court found as a matter of fact (App. 35-36) and as the jury was free to conclude, Mobil misled its older employees by deliberately choosing *not* to reveal the waiver. Contrary to Respondent's suggestion (Brief at 5), Mobil clearly could have guaranteed Petitioner's lump sum through the waiver provision.

Fifth, Mobil could have implemented a bona fide early retirement plan with financial incentives and have avoided any discriminatory impact.

Finally, Mobil *could have accomplished its purposes* of "fairness," preventing "plan drain," and protecting "improvident investors" *by refraining from imposition of the window* and thus eliminating the discriminatory Hobson's choice. With no "window," there would have been no forced departure of more than 1,000 employees into the marketplace with less than $250,000 in adjusted dollars, nor an extraordinary $350,000,000 drain on the plan in 1984.

3. The Court's Analysis Was Plainly Wrong.

Respondent argues, in essence, that the court of appeals must have engaged in a reasoned analysis of Mobil's asserted business reasons simply because it was supposed to. Its opinion, however, is devoid of any such "reasoned analysis." None of the evidence presented above was addressed anywhere in the opinion.

The fact is that the Tenth Circuit engaged in no "reasoned analysis" of Mobil's proffered justifications on an impact basis insofar as they related to the challenged practices. Rather, it accepted them on their face, recited them in a vacuum, implicitly determined without analysis that no reasonable fact finder could reject them, viewed them through the prism of an indirect treatment analysis, and for good measure, examined them under the wrong tests according to the wrong evidence. This, alone, compels reversal.

B. The Court of Appeals Misapplied the *McDonnell/Burdine* Approach, Ignored Petitioner's Direct Evidence Of Pretext And Usurped The Jury's Province.

Contrary to respondent's contention (Brief at 8) that *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711

(1983), "has nothing to do with this case," *Aikens* clearly applies to ADEA cases. *Aikens* directs that, after an ADEA case has been fully tried, a court of appeals should proceed directly to the ultimate issue of discrimination, considering *all* the evidence. Respondent points out (Brief at 9 n.6) that many courts of appeal in addition to the Tenth Circuit also persist in applying the three-step *McDonnell/Burdine* analysis to fully tried ADEA cases. The fact that numerous courts of appeal are ignoring *Aikens* argues for, rather than against, the grant of certiorari.

Mobil conspicuously fails to address Petitioner's argument that the verdict was also supported by direct evidence of discrimination and pretext. Pet. at 25-26. *See also, EEOC v. Westinghouse Elec. Corp.*, 907 F.2d 1354, 1363 (3d Cir. 1990) (pressuring older workers to choose retirement by misleading them about options may violate ADEA); *Baker v. Sears, Roebuck & Co.*, 903 F.2d 1515, 1523 (11th Cir. 1990) (a policy of forcing older, more highly compensated employees to "choose" retirement involuntarily can constitute direct evidence of age discrimination).

In jumping, without analysis, to the conclusion that Mitchell did not offer sufficient evidence to rebut Mobil's "plan drain" and "fairness" reasons, the Tenth Circuit usurped the jury's function by depriving it of the right to reject Mobil's alleged reasons in the first instance. *Cf. Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir. 1990) (sustaining plaintiff's ADEA verdict because "the jury was entitled to disbelieve [the employer's] proffered reasons or infer that age was also a determining factor in the decision . . . . "); *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207-208 (5th Cir. 1986) (jury is free to weigh credibility and disbelieve employer's self-serving testimony); *Hagelthorne v. Kenicott Corp.*, 710 F.2d 76, 83 (2d Cir. 1983)

(judgment n.o.v. properly denied where defendant's evidence was not "so great as to compel acceptance"). *See also, Harris v. Marsh,* 679 F.2d 1204, 1282-85 (E.D.N.C. 1987); *EEOC v. Sandia Corp.,* 639 F.2d 600, 622-23 (10th Cir. 1980).

When an ADEA plaintiff presents a prima facie case of discrimination because of age (which Mitchell did) and when that case includes discrediting of defendant's business reasons by cross-examination of the employer's officers, that case is sufficient in and of itself to support a verdict of discrimination if for no other reason than that the jury is free to disbelieve the defendant's alleged business reasons. When that occurs, the prima facie case has *not* been rebutted and the inference of discrimination carries the plaintiff's burden. See Notes, Fed. R. Evid. 403.

C. The Tenth Circuit's Reading of *Firestone* To Deny Petitioner Standing Under Section 510 Creates A Split Among the Circuits.

Contrary to Mobil's statements, Petitioner did prevail on his Section 510 claim. As the Tenth Circuit recognized, the District Court found in favor of Petitioner on "all of his ERISA claims." App. 21 & 38. The trial court thus found that Mobil had interfered with Petitioner's attainment of a right to which he was entitled under the retirement plan, placing him squarely within the class of persons protected by Section 510.

The Tenth Circuit's application of *Firestone* to deprive Petitioner of standing to state a Section 510 claim directly conflicts with *McLendon v. Continental Can Co.,* 908 F.2d 1171 (3d Cir. 1990). As the Third Circuit held, individuals who prove a Section 510 violation by showing that the prohibited conduct interfered with plan rights have

standing under ERISA. The Third Circuit extended standing to employees and affected individuals who could not prove that they were pension plan participants, a result directly contrary to the Tenth Circuit's extension of the *Firestone* standing requirements.

The trial court's determination that Mitchell would have worked and accrued retirement plan benefits for an additional four years but for his constructive discharge provides compelling support for the *McLendon* rationale. Otherwise, Section 510 is rendered a nullity since, by its own terms, it expressly applies to that class of individuals who have been deprived of participant status by the prohibited acts of the employer and others. Mitchell, having "prevail[ed] in a suit for benefits," is clearly entitled to standing for his ERISA claims. *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 945, 958 (1989).

CONCLUSION

For the special and important reasons described in his Petition and this Reply Brief, Petitioner respectfully requests this Court to exercise its discretion to grant a writ of certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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DATED THIS 28TH DAY OF SEPTEMBER 1990.